Contracts often contain force majeure clauses designed to excuse one or both parties from performance upon triggering events such as acts of God,[10] governmental regulations, floods, or labor strikes.[11] The force majeure clause must define the breach for which the promisor seeks to be excused, define the force majeure event, require, and define a causal nexus between the breach and the event, and explain the remedy if performance is excused.[12]

A court may interpret a force majeure clause in a commercial lease as excusing a tenant's rent obligation.[13] Courts typically interpret force majeure clauses narrowly, especially when the parties are sophisticated commercial parties with equal bargaining power.[14] Few reported decisions involve force majeure clauses that explicitly contain the word "pandemic" as a force majeure event.[15] While most states do not require force majeure clauses to include the specific

[10] Courts have interpreted act of God provisions and when they are triggered. *See, e.g.*, *In re* Flood Litigation, 607 S.E.2d 863, 877-78 (W. Va. 2004) ("'[A]n 'Act of God' is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected.' In contrast, '[t]hat which reasonable human foresight, pains, and care should have prevented can not be called an act of God.'") (second alteration in original) (citation omitted); Gleeson v. Va. Midland R.R. Co., 140 U.S. 435 (1891); Cormack v. New York, N.H. & H.R. Co., 90 N.E. 56 (N.Y. 1909). Black's Law Dictionary defines an act of God as, "[a]n overwhelming, unpreventable event caused exclusively by force of nature, such as an earthquake, flood, or tornado." *Act of God*, BLACK'S LAW DICTIONARY (11th ed. 2019). California's Public Contract Code defines an act of God as "earthquakes in excess of a magnitude of 3.5 on the Richter Scale and tidal waves." CAL. PUB. CONT. CODE § 7105(b)(2) (West 2022). *See generally* 22 RICHARD A. LORD, WILLISTON ON CONTRACTS § 59:29 (4th ed. 2021) (applying acts of God to the law of carriers).

[11] J. Hunter Robinson et al., *Use the Force? Understanding Force Majeure Clauses*, 44 AM. J. TRIAL ADVOC. 1, 8 (2020); Jessica S. Hoppe & William S. Wright, *Force Majeure - Clauses in Leases*, PROB. & PROP., Mar.-Apr. 2007, at 8, 9.

[12] Paula M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, AM. BAR. ASS'N (Mar. 25, 2021), https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/. See Christian Twigg-Flesner, *A Comparative Perspective on Commercial Contracts and the Impact of COVID-19 - Change of Circumstances,* Force Majeure*, or what?* COLUM. L. SCH. (Apr. 20, 2020), https://scholarship.law.columbia.edu/books/240/ for a discussion of the impact of force majeure clauses on commercial contracts during the onset of the COVID-19 pandemic in United States and foreign jurisdictions. *See generally* 14 JOSEPH M. PERILLO & JOHN E. MURRAY, JR., CORBIN ON CONTRACTS § 74.19 (2022) (discussing force majeure clauses).

[13] *See* discussion *infra* Section III.A.

[14] Hoppe & Wright, *supra* note 11, at 10.

[15] A Westlaw search for cases conducted May 28, 2022 for "'force majeure' /p pandemic" in all state and federal jurisdictions retrieved 116 results. Four of those results were cases which listed pandemics or epidemics as a force majeure clause. *See* Huth v. Am. Inst. for Foreign Study, Inc., No. 20-CV-01786, 2022 WL 834419 (D. Conn. Mar. 21, 2022); Republican Party of Tex. v. Hous. First Corp., No. 14-20-00744-CV, 2022 WL 619708 (Tex. App. Mar.

event that triggers the clause for these affirmative defenses to succeed in courts, New York courts ordinarily require that the clause lists the events.[16] Moreover, events that occur with regularity may cease to be considered force majeure events.[17]

B. Impracticability and Impossibility

[omitted]

C. Frustration of Purpose

[omitted]

III. PANDEMIC CASE REVIEW

A. Offering and Denying Relief Under Force Majeure Clauses

Many courts have refused to excuse performance during the pandemic based on precisely worded force majeure clauses. For example, in *In re CEC Entertainment, Inc.* a bankruptcy court held that the pandemic did not excuse the operator of Chuck E. Cheese ("CEC") restaurant and entertainment venues from paying rent during the pandemic under the force majeure clause of its leases and under the doctrine of frustration of purpose.[18] CEC's business model relied heavily on a combination of entertainment and dining, as half of their revenue came from the former and 30% from the latter.[19] Many landlords initially objected to CEC's rent abatement motion but resolved their objections, leaving the court to interpret six leases from venues across three

3, 2022); Zhao v. CIEE Inc., 3 F.4th 1 (1st Cir. 2021); Denbury Onshore, LLC v. APMTG Helium, 476 P.3d 1098 (Wyo. 2020).

[16] Hoppe & Wright, *supra* note 11, at 9; One World Trade Ctr., LLC v. Cantor Fitzgerald Sec., 789 N.Y.S.2d 652, 655 (Sup. Ct. 2004) (quoting Kel Kim Corp. v. Cent. Mkts., Inc. 519 N.E.2d 295, 296 (N.Y. 1987)) ("The general rule is that '[o]rdinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused.") (alteration in original).

[17] Hoppe & Wright, supra note 11, at 11-12 (discussing catastrophic weather events). [I have omitted the rest of this footnote. I discussed other public health emergencies, such as the recurrence of Ebola and new cases of an avian fu.]

[18] *In re* CEC Ent., Inc., 625 B.R. 344, 353, 364 (Bankr. S.D. Tex. 2020).

[19] *Id.* at 349.

states.[20] The Bankruptcy Code lets debtors suspend lease payments on nonresidential real property for a short time for cause.[21] However, debtors like CEC and other businesses sought more extensive relief, such as complete or partial rent abatement.

The court analyzed six force majeure clauses from the venues' leases and concluded that five were very similar in structure.[22] They all list acts of God and governmental restrictions as well as several other events as events that could trigger the force majeure clause. Critically, the clauses end with a sentence that states that the force majeure clause does not apply if either party lacked funds. For example, the Greensboro, North Carolina lease states:

> [I]f either party shall be prevented or delayed from punctually performing any obligations or satisfying any condition under this Lease by any . . . act of God, unusual governmental restriction, regulation or control, . . . then the time to perform such obligation or to satisfy such condition shall be extended on a day-for-day basis for the period of the delay caused by such event. . . . This Section shall not apply to the inability to pay any sum of money due hereunder or the failure to perform any other obligation due to the lack of money or inability to raise money or inability to raise capital or borrow for any purpose.[23]

CEC argued that the pandemic was both an act of God and that governors' orders restricting indoor dining and the operation of arcades triggered the government restriction event in the force majeure clause and should excuse the company's rent obligations.[24] However, the court declined to determine whether these events triggered the force majeure clause because it reasoned that the final sentence of the force majeure clause, the lack of fund provision, did not allow for a rent

[20] *Id.*
[21] *Id.* at 353. A court may delay lease payments on nonresidential real property for 60 days when a corporation files for bankruptcy. 11 U.S.C. § 365(d)(3). A court may delay payments for an additional 60 days for subchapter V debtors who are experiencing a COVID-19 hardship. *Id.* § 365(d)(3)(B)(i).
[22] *CEC Ent.*, 625 B.R. at 353-57. The Granada Hills, California lease contained an anti-force majeure clause that required performance "even in the face of 'acts of God, or any other cause beyond the reasonable control of either party.'" *Id*. at 356.
[23] *Id.* at 353-54 (emphasis omitted).
[24] *Id.* at 354.

abatement.[25] The court applied state contract law to each of the six clauses and came to the same conclusion.[26] Notably, the Lynnwood, Washington, lease differs from the five other leases because it has an explicit anti-force majeure provision that force majeure events do not excuse the tenant's duty to pay rent.[27] In assessing CEC's frustration of purpose defenses, the court reasoned the force majeure clauses superseded CEC's frustration of purpose defenses.[28]

On the other hand, some courts have offered partial relief in cases involving almost identical force majeure clauses. For example, while the court in *CEC Entertainment* offered no relief, another bankruptcy court in *In re Hitz Restaurant Group* offered partial rent relief to a restaurant that faced similar governmental orders.[29] Utilizing case law, the *Hitz* court resolved a dispute according to the general/specific canon of interpretation.[30] Under this canon, specific provisions prevail when there is a conflict between a general provision and a specific provision in a statute or contract.[31]

Hitz's landlord sought an order for Hitz to pay post-petition rent.[32] The court found that Illinois Governor J. B. Pritzker's March 16, 2020, executive order that banned on-premises food or beverage consumption triggered the force majeure clause in the restaurant's lease,[33] which

[25] *Id.*
[26] *Id.* at 353-57.
[27] *Id.* at 355.
[28] *Id.* at 358-363.
[29] *In re* Hitz Rest. Grp., 616 B.R. 374, 380 (Bankr. N.D. Ill. 2020). The company filed for Chapter 11 protection on February 24, 2020, so its March 2020 rent would have been its first month of post-petition rent due under 11 U.S.C. § 365(d)(3). *Id*.
[30] The general/specific canon states that where there are conflicting provisions that cannot be reconciled, the specific provision prevails. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183-188 (2012). The reasoning behind this canon is that a "specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." *Id.* at 183.
[31] *Id.*
[32] *Hitz*, 616 B.R. at 376.
[33] *Id.* at 377-78.

contained standard force majeure triggering events and ended with a lack of money provision, akin to the leases in *CEC Entertainment*:

> Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented, retarded or hindered by . . . laws, governmental action or inaction, orders of government. . . . Lack of money shall not be grounds for Force Majeure.[34]

The court looked to Illinois case law which states that force majeure clauses "excuse contractual nonperformance if the triggering event cited by the party was, in fact, the proximate cause of the party's nonperformance."[35] In the eyes of the court, Governor Pritzker's executive order was a government action that was the proximate cause that prevented the restaurant from offering indoor dining.

Unlike in *CEC Entertainment*, the *Hitz* court found the "governmental action" provision and the lack of money provision to be in conflict.[36] The court cited a Seventh Circuit case that reasoned that the most specific provision should control when contract terms are in dispute.[37] The *Hitz* court reasoned that Governor Pritzker's executive order was the direct and proximate cause of the restaurant's inability to pay post-petition rent (a specific event) and that a lessee can lack money for many reasons (a general circumstance).[38] Further, the court rejected the landlord's argument that the restaurant could have sought a Small Business Administration loan to pay the rent because the force majeure clause did not require the affected party to borrow money to counteract its nonperformance.[39]

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[34] *Id.* at 376-77.
[35] *Id.* at 377.
[36] *Id.* at 378 n.2
[37] *Id.*
[38] *Id.*
[39] *Id.* at 378.

However, the court did not entirely excuse the restaurant from its rent obligation. Because Governor Pritzker's executive order allowed off-premises consumption through means such as delivery or takeout, the court ordered the restaurant to pay 25% of its rent, common area maintenance fees, and real estate taxes from March 2020 to June 2020, the period the restaurant was closed except for takeout, because the restaurant's kitchen comprised 25% of the square footage of the restaurant.[40] Interestingly, and perhaps to its detriment, the landlord did not address the issue of partial rent reduction.[41]

B. Relief Interpreting Specific Purposes

Some commercial leases explicitly identify a specific purpose for which tenants may use their leased premises through a specific limited use clause, also called a permissible use provision.[42] For example, the lease in *UMNV 205-207 Newbury, LLC v. Caffé Nero Americas Inc.* specifies that the tenant, Caffé Nero on 205-207 Newbury Street in Boston, Massachusetts, could only use the leased premises for "[t]he operation of a Caffé Nero themed café under Tenant's Trade Name and for no other purpose."[43] The lease requires the tenant to operate this location similar to the other Caffé Nero locations in the Greater Boston region.[44] In the words of the court's decision in an order on a motion for partial summary judgment, the Caffé Nero business model was "to serve great coffee and food that customers could enjoy and linger over in

[40] *Id.* at 379-80.
[41] *Id.* at 379.
[42] *See generally* STUART M. SAFT, COMMERCIAL REAL ESTATE TRANSACTIONS § 10:38 (3d ed. 2021) (discussing use of premises provisions in commercial leases).
[43] UMNV 205-207 Newbury, LLC v. Caffé Nero Ams. Inc., No. 2084CV01493-BLS2, 2021 Mass. Super. LEXIS 12, at *3 (Super. Ct. Feb. 8, 2021).
[44] *Id.*

a comfortable indoor space."[45] Further, the Newbury Street location lease stated that takeout sales were only available from the café's regular sit-down menu.[46]

Massachusetts Governor Baker's executive order prevented Caffé Nero from offering indoor food and beverage services beginning March 24, 2020.[47] Consequently, Caffé Nero could not run its business and abide by its lease's specific limited use clause. As a result, it stopped paying rent in March 2020.[48] Eventually, in June 2020, Caffé Nero reopened at a limited capacity as permitted by the state's phased reopening plan.[49] Ultimately, it vacated its premises on October 29, 2020.[50]

Caffé Nero has a standard force majeure provision in its lease, which the court found addressed the doctrine of impossibility:

> Neither the Landlord nor the Tenant shall be liable for failure to perform any obligation under this Lease, except for the payment of money, in the event it is prevented from so performing by . . . order or regulation of or by any governmental authority . . . or for any other cause beyond its reasonable control, but financial inability shall never be deemed to be a cause beyond a party's reasonable control . . . and in no event shall either party be excused or delayed in the payment of any money due under this Lease by reason of any of the foregoing.[51]

However, the court found that the force majeure clause did not address the "risk that the performance could still be possible even while main [sic] purpose of the [l]ease is frustrated by events not in the parties' control."[52] The inclusion of the two exceptions to the clause's applicability for "financial inability" or the failure to make a "payment of money" are indications

[45] *Id.*
[46] *Id.*
[47] *Id.* at *4.
[48] *Id.* at *6-7.
[49] *Id.*
[50] *Id.*
[51] *Id.* at *14 (emphasis omitted).
[52] *Id.* at *14-15.

that the parties could perform their obligations even if it the purpose of the lease was frustrated.[53] Hence, the frustration of purpose defense was available to the tenant and was not precluded by the force majeure clause.[54] Therefore, in a rare decision, the court discharged Caffé Nero's rent obligation from March 24, 2020, through June 22, 2020.[55]

Other specific limited use clauses include language that makes it more difficult for courts to excuse performance entirely. For example, in *STORE SPE LA Fitness v. Fitness International Inc.*, a landlord sued the owners of three fitness centers for breach of contract to recover rent and for damages to one of the center's HVAC systems.[56] The centers did not pay rent while closed to follow Kentucky Governor Beshear's executive orders.[57] The court addressed the fitness centers' arguments based on the force majeure provisions and the doctrines of impossibility, impracticability, frustration of purpose, failure of consideration, and condemnation.[58]

The lease for two fitness center locations included the same specific limited use clauses that differ significantly from those found in other leases, such as the Caffé Nero lease. The clause includes a list of fitness center-related uses but also states that, "[t]enant shall use the Leased Premises . . . for any other lawful purposes with the prior written consent of Landlord."[59] Nevertheless, the fitness centers argued that the court should apply the frustration of purpose reasoning from *Caffé Nero* because they could not operate the fitness centers during the months

[53] *Id.*
[54] *Id.* at *15.
[55] *Id.* at *19.
[56] STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036, at *1-2 (C.D. Cal. filed June 30, 2021).
[57] *Id.*
[58] *Id.* at *7-12.
[59] Lease Between Royce G. Pullman M & A, LLC and Global Fitness Holdings, LLC § 1.1(d), STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036 (C.D. Cal. filed June 30, 2021), ECF No. 63-6 [hereinafter *Edge O Lake Lease*]; Lease Between Royce G. Pullman M & A, LLC and Palumbo Drive Fitness, LLC § 1.1(d), STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036 (C.D. Cal. filed June 30, 2021), ECF No. 63-7 [hereinafter *Blake James Lease*].

the governor's executive order required them to stay closed.[60] The fitness centers also cited a case like *Caffé Nero* where a Michigan court excused a commercial tenant from its rent obligation.[61] The court rejected these analogies because the specific limited use clause let the fitness centers request permission to use the premises for another purpose. [62] Hence, the purpose of the lease was not frustrated.[63] However, Governor Beshear's March 26, 2020 executive order only allowed "life-sustaining businesses" to remain open effective March 26, 2020.[64] Also, the executive order required businesses that could stay open to implement social distancing and enhanced hygiene measures.[65] Thus, it is not certain whether the two fitness centers could have repurposed themselves even if the landlord consented.

The court also rejected the fitness centers' argument that they did not receive the benefit of their bargain while they were closed.[66] The fitness centers had exclusive possession of the premises even though it was temporarily illegal to use them as fitness centers.[67] The fitness center also argued that the executive order constituted a temporary taking under two leases, which have condemnation clauses that discuss appropriation and takings by public authorities, so the temporary taking should excuse the centers of their rent obligations.[68]

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[60] Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment at 14-15, STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036 (C.D. Cal. filed June 30, 2021), ECF No. 68.
[61] *Id.* at 15. *See also* Bay City Realty, LLC v. Mattress Firm, Inc., No. 20-CV-11498, 2021 WL 1295261 (E.D. Mich. Apr. 7, 2021) (releasing a bedding store from its obligation to pay rent for two months while the store was closed due to Governor Whitmer's executive order under the doctrine of frustration of purpose).
[62] *STORE SPE LA Fitness*, 2021 WL 3285036, at *10.
[63] *Id.*
[64] Ky. Exec. Order No. 2020-257 (Mar. 25, 2020), https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf. The Executive Order listed 19 categories of life-sustaining business that could remain open in addition to federally designated critical infrastructure sector businesses. *Id.*
[65] *STORE SPE LA Fitness*, 2021 WL 3285036, at *10.
[66] *Id.*
[67] *Id.*
[68] *Id.*; *Edge O Lake Lease*, *supra* note 59, § 4.2; *Blake James Lease*, *supra* note 59, § 4.2. *Cf.* JWC Fitness, LLC v. Murphy, 265 A.3d 164 (N.J. Super. Ct. App. Div. 2021) (recognizing that Governor Murphy's executive orders temporarily closing and placing restrictions on a kickboxing gym did not effectuate a compensable physical or regulatory taking of property).

The fitness centers argued that the force majeure clauses in their leases should have excused their rent obligations. However, they asserted to the court that they could pay their rent, so the clauses, which required an inability to perform, could not excuse their obligations. Moreover, even if they were excused, all three leases included force majeure clauses that extended the time for performance if a force majeure clause caused a delay.[69] For example, the Edge O Lake location and the Blake James location leases state:

> If either party is delayed or prevented from any of its obligations under this Lease by any reason of strike, labor troubles or any other cause whatsoever beyond such party's control, then the period of such delay or such prevention shall be deemed added to the time provided herein for the performance of any such obligation.[70]

Unlike some other force majeure clauses in commercial leases, this clause states that performance is only delayed for the time performance was prevented.[71] Thus, it would be very difficult to read this clause as completely abating rent.[72]

The court further rejected the fitness centers' impossibility and impracticability arguments for the same reason it rejected the force majeure argument—the fitness centers had shown they had the ability to pay the rent due, so the pandemic did not make performance impossible despite their loss of revenue.[73]

STORE SPE LA Fitness v. Fitness International Inc. is a notable case because the parties seeking rent abatement conceded their ability to pay, which prevented using the force majeure clause to excuse performance. Gyms generally operate on an automatically recurring

[69] *STORE SPE LA Fitness*, 2021 WL 3285036, at *7-8.
[70] *Id.* at *8.
[71] Compare *supra* text accompanying notes 23, [omitted], 70 (providing for addition to time provided to perform obligation), *with supra* text accompanying notes 34, [omitted], 51, [omitted] (providing for no addition to time perform obligation).
[72] *STORE SPE LA Fitness*, 2021 WL 3285036, at *8.
[73] *Id.*

membership model that provides a relatively stable revenue stream.[74] On the other hand, restaurants, which operate on small profit margins,[75] seem less likely to maintain enough revenue streams when closed or operating at partial capacity. Courts have proven hesitant to reallocate contracting risk between sophisticated parties. While courts typically interpret contracts against the drafter, courts are less likely to follow that principle when the parties are sophisticated businesses with equal bargaining power.[76]

IV. PROHIBITION-ERA COMMERCIAL LEASE CASES INVOLVING SPECIFIC LIMITED USE CLAUSES

[omitted]

V. RECOMMENDATIONS FOR DRAFTING

Two main issues in commercial leasing emerge from the pandemic: how courts will interpret leases where one party fails to perform and how transactional lawyers can draft leases and other contracts moving forward to avoid litigation from similar future occurrences. Trial courts heard most cases discussed in this article; however, there are already cases on appeal, and some appellate courts have issued decisions.[77] Still, patterns in judges' reasoning have emerged. Courts are reading lease provisions closely, construing contracts as a whole, and responding to parties' good faith arguments. Courts have been hesitant to reallocate the risk between

[74] *See* Cheryl Wischhover, *Gyms Aren't Making It Easy for People to Cancel Memberships*, VOX (Oct. 9, 2020, 7:00 AM), https://www.vox.com/the-goods/21497534/cancel-gym-membership-crunch-equinox-planet-fitness (reporting difficulties consumers faced when attempting to cancel gym memberships during the onset of pandemic).
[75] Stefon Walters, *The Average Profit Margin for a Restaurant*, USA TODAY (Aug. 22, 2019), https://yourbusiness.azcentral.com/average-profit-margin-restaurant-13113.html (noting that full-service restaurants generally have profit margins between 3% and 5%).
[76] *See, e.g.*, Hoppe & Wright *supra* note 11, at 9.
[77] *See, e.g.*, JN Contemporary Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118 (2d Cir. 2022) (affirming lower court's holdings that COVID-19 pandemic and resulting governor's orders restricting nonessential businesses triggered a force majeure contract in an auction house's consignment and sales agreement and that the parties' agreement did not require the auction house to conduct another auction); AGW Sono Partners, LLC v. Downtown Soho, LLC, 273 A.3d 186 (Conn. 2022) (affirming lower court's holdings that restaurant tenant that breached lease agreement by failing to pay rent during the pandemic was not entitled to relief under impossibility and frustration of purpose).

commercially sophisticated parties where they have already contracted for it in a provision such as a force majeure clause.

Lawyers who draft leases should consider writing new force majeure clauses considering how judges have construed their terms to date. There will likely be additional global viral outbreaks due to modern human social practices,[78] so lawyers should prepare accordingly. Clauses that define force majeure events in detail avoid confusion. Equally importantly, the scope of relief should be well thought out.

Lawyers and businessowners should consider whether government orders should be a force majeure event based on their business or industry. If the business would be impacted by a government shutdown, the parties should consider various scenarios, such as a complete shutdown versus a partial shutdown and the length of the shutdown. Parties may wish to include relief dependent on the exact event. For example, a restaurant may consider offering to pay rent based on revenue rather than a base rent during a partial shutdown. Landlords would need immediate access to reliable financial records in this circumstance. While landlords would not receive full rent, this compromise could prevent or discourage a tenant from withholding rent, filing for bankruptcy, or closing entirely. Had the parties added a clause like this in their leases, then the *Hitz* and *CEC Entertainment* decisions could be reconciled more easily. Parties can determine how to handle certain situations in advance and avoid the need for costly litigation that might produce uncertain outcomes dependent on jurisdiction and judicial assignment. Drafters

[78] Jon Hilsenrath, *Global Viral Outbreaks like Coronavirus, Once Rare, Will Become More Common*, WALL ST. J. (Mar. 6, 2002, 5:30 AM), https://www.wsj.com/articles/viral-outbreaks-once-rare-become-part-of-the-global-landscape-11583455309 (noting urbanization, globalization, and increased human consumption of animal proteins are causing an increase in the number of epidemics); *Zoonotic Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 1, 2021), https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html (noting that three-quarters of new or emerging infectious diseases in people come from animals); *see also* sources cited *supra* note 17.

can use the provision in *Securities Trust & Savings Bank*[a] as a starting point. It gave the landlord sole discretion over the new rent if the city went dry. The clause in *Securities Trust & Savings Bank* ultimately led to litigation, so parties should be more forward-thinking and specify any precise rent adjustment if business operations are suspended or limited.

CONCLUSION

The COVID-19 pandemic exposed many ambiguities in contracts and leases that seemed clear and workable before. Moving forward, parties should attempt to be as specific as they can in leases, given the high stakes businesses face when relying on these documents. Lawyers must continue to consider the consequences of specific limited use clauses, force majeure clauses, and any interaction between the two when they write contracts.

The pandemic has highlighted several novel issues in the interpretation of contracts in the aftermath of government-mandated shutdowns. Parties will likely remain in dispute over pandemic-related contract terms for a long time. It is unlikely that COVID-19 will be the last global pandemic; local and regional health emergencies will continue to arise as well. By learning from issues that surfaced in pandemic contract disputes, drafters can work to write leases that will withstand other types of new disasters, government regulations, and unpredictable business outcomes. The pandemic has caused significant loss, changed people's habits forever, and may bring more surprises. The tensions exposed in leases have signaled the need for precise drafting that is durable yet adaptable to new and evolving situations.

[a] *Securities Trust & Savings Bank* is discussed in Part IV (Prohibition-Era Commercial Lease Cases Involving Specific Limited Use Clauses), which has been omitted in this writing sample. The five-year lease in *Securities Trust & Savings Bank* has a specific limited use clause that allows the tenant to use the premises as a "general retail liquor establishment." Sec. Tr. & Sav. Bank v. Claussen, 187 P. 140, 140 (Cal. Dist. Ct. App. 1919). The lease also permits the landlord to grand a rent reduction of an amount in its discretion if the city where the bar was located enacted dry laws. *Id.*

Applicant Details

First Name	**Ryan**
Middle Initial	**C**
Last Name	**Maamoun**
Citizenship Status	**U. S. Citizen**
Email Address	**ryan.maamoun@gmail.com**
Address	**Address** Street **249 North 5th Street** City **Brooklyn** State/Territory **New York** Zip **11211** Country **United States**
Contact Phone Number	**3303988303**

Applicant Education

BA/BS From	**University of Akron**
Date of BA/BS	**May 2009**
JD/LLB From	**Emory University School of Law** **https://law.emory.edu/index.html**
Date of JD/LLB	**May 12, 2022**
Class Rank	**5%**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Rosen, Brian
brian.rosen@lw.com
212-906-3872
Schapiro, Robert
rschapiro@sandiego.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

RYAN C. MAAMOUN

249 North 5th Avenue, Apt. 506 Brooklyn, NY 11211
(330) 398-8303 | ryan.maamoun@gmail.com

June 2, 2023

The Honorable Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I write to apply for a clerkship in your chambers for the 2024-25 term. Ever since my second semester at Emory Law, my plan has been to work for some time at a law firm and to subsequently apply for a clerkship. I have now been working at Latham & Watkins for nearly a year and believe that the experiences I have obtained will make me a more effective clerk.

During my time at law school, I interned for Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia, where I learned how to become an effective legal writer and adept researcher. I have a myriad of legal experiences as I also served as a research assistant for Professor Peter Hay in the area of Conflict of Laws, participated in both moot court and mock trial competitions, and externed for the Coca-Cola Company's office of General Counsel.

Before law school, I had an extensive career as an advisory consultant for PricewaterhouseCoopers in Dubai and Saudi Arabia. My fluency in Arabic and French served me well in advising clients across the Middle East. I have also worked for a brief time in the United State Senate and attained my master's degree from the George Washington University in International Affairs.

Enclosed are my résumé, transcripts and writing sample. My letters of recommendation are from Dean Robert Schapiro (619.260.4527), schapiro@sandiego.edu and attorney Brian Rosen (212.906.4505), brian.rosen@lw.com.

I welcome the opportunity to meet with you at your convenience to discuss my application. Thank you for your consideration and I look forward to hearing from you.

Sincerely,

Ryan Maamoun

RYAN C. MAAMOUN

249 North 5th Avenue, Apt. 506 Brooklyn, NY 11211
(330) 398-8303 | ryan.maamoun@gmail.com

EDUCATION

Emory University School of Law — **Atlanta, GA**
Juris Doctor, high honors, Order of the Coif — May 2022
GPA: 3.857 (Top 5% - Rank: 9th)
Activities: 2nd Best Appellate Brief Award in the Stange Moot Court Competition, Mock Trial Team, Research Assistant to Peter Hay in his study of Conflict of Laws.

George Washington University - Elliott School — **Washington, DC**
Master of Arts in International Affairs, distinction — May 2012

University of Akron — **Akron, OH**
Bachelor of Arts in Political Science and Business, summa cum laude — May 2009
GPA: 3.82

PROFESSIONAL EXPERIENCE

Latham and Watkins — **New York, NY**
Associate, 3L Legal Intern, Summer Associate — May 2021 – Current

- Research laws and draft motions and memorandums on a variety of legal issues.
- Draft agreements, conduct due diligence and communicate with clients.

United States District Court for the District of Columbia — **Washington, DC**
Judicial Intern to Honorable Amy Berman Jackson — May 2020 – August 2020

- Drafted and edited court orders and opinions.
- Conducted legal research, prepared summaries and briefed law clerks on relevant case law and federal statutes.

The Coca-Cola Company — **Atlanta, GA**
Legal Extern, M&A Group — August 2021 – November 2021

- Researched a variety of legal and factual issues to support the Office of General Counsel.
- Drafted and reviewed contracts for both the M&A group and commercial contracts arm of the company.

PricewaterhouseCoopers — **Riyadh, SA & Dubai, UAE**
Consultant, Advisory — March 2015 – January 2018

- Managed multiple private and public projects, including projects with Saudi Ministries for Vision 2030.
- Monitored progress, managed risks and ensured key stakeholders were kept informed on all project deliverables.

G.D.S. LLC — **Washington, DC & Atlanta, GA**
Account Manager — October 2011 – November 2014

- Cultivated new accounts and established strong business relations ushering in new key accounts.
- Set new standard operating procedures for status reports, stakeholder engagement and account management.

Office of United States Senator Sherrod Brown — **Washington, DC**
Intern/Research Assistant — January 2009 – June 2009

- Participated in research projects and analyzed project requests.

ADDITIONAL INFORMATION

Languages: Trilingual (Arabic, French and English).
Service: International Refugee Assistance Program and Heart of Passion (Mentorship Program).
Interests: Playing Guitar, Topical Reading, Basketball (watching and playing) and Travel.

LATHAM & WATKINS LLP

1271 Avenue of the Americas
New York, New York 10020-1401
Tel: +1.212.906.1200 Fax: +1.212.751.4864
www.lw.com

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June 7, 2023

The Honorable Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Ryan Maamoun Clerkship Application

Dear Judge Sánchez:

I write to recommend Ryan Maamoun for a clerkship. I am a senior associate with Latham & Watkins LLP in the New York Office, and I have worked with Ryan on a large and complex matter this year.

As a member of our team, Ryan immediately made helpful contributions. His legal research has been thorough and completed in a timely manner. He often identifies and understands both sides of the issue and asks pointed questions to get to the heart of the matter. He has also been a key contributor to other aspects of case preparation, including drafting motions and coordinating different work streams in our matter. During our time working together, Ryan has consistently remained attentive to detail and diligent.

Ryan has always expressed eagerness and enthusiasm to any and all tasks assigned to him, and does so with a good nature. Ryan would make a welcome addition to any chambers. Please do not hesitate to contact me if you have any questions.

Sincerely,

Brian S. Rosen

Brian S. Rosen

University of San Diego SCHOOL OF LAW

June 7, 2023

Dear Judge Sanchez:

I write with great enthusiasm to recommend Ryan Maamoun for a clerkship in your chambers. Ryan was one of the most intellectually gifted members of his class, and based on my personal knowledge of his superb legal abilities, I am certain that he would be an excellent clerk.

Ryan's outstanding record speaks for itself. He graduated near the very top of a talented class. His drive and abilities earned him a highly sought after position at a leading law firm. Even these strong credentials, though, do not fully capture Ryan's skill and promise.

I had the pleasure of getting to know Ryan when he was a student in my civil procedure class in his first year at Emory Law School. (I subsequently left Emory to become the dean at the University of San Diego School of Law.) Many students find civil procedure to be an especially difficult course. The intricate interplay of rules, statutes, and cases often proves to be a daunting introduction to law school. Ryan, however, had no difficulty in unraveling the complexities. He always was well prepared for class, and his comments demonstrated his complete comprehension of the material. Ryan demonstrated great engagement with the course. He would often follow up on class discussions by continuing the conversation after class, during office hours, or by email. His probing inquiries demonstrated admirable intellectual curiosity. He often sought to pursue issues more deeply than the presentation in class or in the textbook. In keeping with his strong classroom performance, Ryan wrote an excellent final exam. He received one of the very few grades of "A" in a class of 86 students.

I have reviewed some of Ryan's written work, and these fine pieces further demonstrate Ryan's impressive legal abilities, including his great strength at legal research and writing. In his legal writing class, Ryan wrote a memo concerning the application of the doctrine of tortious interference with a business relationship under Florida law. Ryan does a terrific job of explicating the relevant doctrines. He carefully describes the elements of tortious interference and then thoroughly explains how the facts fit into the doctrine. Ryan presents a persuasive argument about the resulting legal conclusions. He takes care to articulate how the precedents support his interpretation and to distinguish potentially conflicting authority. He further notes the additional information that the party could obtain to strengthen its case. The memo is well researched and well argued. Despite the complexity of the factual scenario, Ryan's writing retains admirable clarity.

OFFICE OF THE DEAN
Warren Hall, Room 200 | 5998 Alcalá Park, San Diego, CA 92110-2492
P: (619) 260-4527 | F: (619) 260-6815 | lawdean@sandiego.edu

I also reviewed Ryan's seminar paper exploring the cutting-edge issue of Amazon's potential liability for defective products sold through its site. Ryan begins with a cogent discussion of the evolution of products liability doctrine, emphasizing the various policy concerns and highlighting the features that will be most important in the Amazon analysis. He then offers an illuminating account of the different modalities by which products are sold on the Amazon site, including "Fulfilled by Amazon" ("FBA"), "Fulfilled by Merchant" ("FBM"), and "Seller-Fulfilled Prime" ("SFP").

With this important background, Ryan reviews the cases attempting to grapple with Amazon's liability for defective products. For most of the products on its site, Amazon is not technically the seller, and yet its role vastly exceeds a mere marketer or promoter. Ryan attends carefully to the potentially competing policy considerations and how they apply to the various kinds of transactions facilitated through Amazon's website. Ryan develops his own argument for the appropriate scope of Amazon's liability. He notes that traditional concepts, such as "title," do not easily apply in this setting. Carefully parsing the relevant policy concerns, in light of the complex factual situation, Ryan presents a compelling argument for Amazon's liability in a variety of scenarios. At the same time, he acknowledges that it would be impractical and unwise to hold Amazon liable for defects in all of the 500 million products listed on its site. As with the legal writing memo, Ryan succeeds in engaging with the full complexity of the facts, while presenting an argument of admirable clarity and cogency.

Ryan and I spoke often, I was consistently impressed with his deep intellectual curiosity and engagement. Ryan participated actively in Inn of Court activities, and we had frequent substantive conversations at those events. Ryan's constitutional law class in the spring of his first year of law school provided further fodder for our discussions. While I did not teach Ryan's constitutional law course, it is a class I frequently teach. I enjoyed the opportunity to talk through constitutional law issues with Ryan, and I appreciated the depth of his interest. Throughout, he demonstrated a deeper level of intellectual curiosity and engagement than the great majority of law students.

Based on my personal knowledge of Ryan's outstanding abilities, including his demonstrated expertise in legal research and writing, I am certain that he would make an excellent clerk. I am pleased to recommend him for a clerkship with great enthusiasm.

Sincerely yours,

Robert A. Schapiro

Robert A. Schapiro
Dean and C. Hugh Friedman
Professor of Law

RYAN C. MAAMOUN

249 North 5th Avenue, Apt. 506 Brooklyn, NY 11211
(330) 398-8303 | ryan.maamoun@gmail.com

WRITING SAMPLE

The following writing sample is the seminar paper I drafted for my products liability course as a 3L at Emory Law. The assignment required independent research and analysis of a topic of choice in products liability.

For purposes of the assignment, I wrote about strict products liability and argued that Amazon.com, Inc. was likely to face an increased risk of liability for defective products sold by third party vendors on their online platform. The assignment required the use of endnotes and a table of contents.

This seminar paper is original work product. To reduce the length of the sample, certain sections and subsections regarding the history of the strict products liability have been omitted.

Breaching the Citadel Firewall

Strict Products Liability in a Time of Amazon and a Place of New York and Beyond

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Abstract

This section of the paper has been omitted due to length limitations but will be provided upon request.

Table of Contents

This section of the paper has been omitted due to length limitations but will be provided upon request.

I. Introduction

Since its emergence, the doctrine of strict products liability had shown a remarkable ability to evolve and adapt to changing economies. However, it has struggled to keep up with Amazon's complete reinvention of retail. The doctrine was developed at a time when supply chains were linear and market participants could be neatly cabined into roles like "seller" or "manufacturer."[1] By design, Amazon's business model has disrupted that paradigm by removing the middlemen between manufacturers and consumers. Consequently, Amazon has reduced the friction that might keep manufacturers from putting dangerous products into the stream of commerce.[2] And while courts have readily held third-party vendors strictly liable for selling defective products through Amazon's website, Amazon's own role in these transactions is far less clear.[3]

Despite the lack of clarity, courts have continued to recognize that the imposition of strict liability on manufacturers, retailers and distributors alike for injuries caused by defective products has advanced desirable social purposes. Those purposes have warranted the shift of loss from consumers to members on the distribution chain. Accordingly, this paper will show that Amazon falls squarely into that distribution chain.

This paper proceeds in four parts. Part II begins with an overview of products liability, its beginnings and evolution across a modernizing economy. Part III focuses on the doctrine's application to Amazon, surveying the most recent case outcomes across multiple jurisdictions, with a focus on New York. Finally, Part IV is prescriptive, discussing the legal and policy considerations of why and how courts should respond to Amazon's disruption of product liability law.

II. Evolution of Products Liability

For more than half a century, manufacturers, sellers and distributors of defective goods have been subject to a special set of tort doctrines—grouped together under the banner "product liability law."[4] This Part begins by reviewing the origins and development of these doctrines,

noting some of the theoretical and policy justifications that have helped ensure their widespread acceptance.[5]

A. A Brief History of Products Liability

The first two subsections, discussing the English origin and first American adaptation of products liability have been omitted due to length limitations but will be provided upon request.

3. A Californian Dawning

The first of the three Californian cases was *Escola v. Coca Cola Bottling Co.*, where Justice Traynor gave strict liability credence in his influential concurring opinion.[6] Though the *Escola* majority held the defendant negligent based on the theory of *res ipsa loquitor*, Traynor's concurrence found that "a manufacturer [should] incur[] an *absolute liability* when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury[.]"[7] Traynor's justifications for such an imposition was the basis for the opinions which later implemented an American strict products liability regime.[8]

The second case, nearly twenty years later, was *Greenman v. Yuba Power Products*, where Traynor's conception of strict liability became law as he penned the majority opinion.[9] In *Greenman*, the California Supreme Court held that "it was sufficient that plaintiff prove that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use."[10] Thus, the manufacturer was held strictly liable for the defective design and manufacture of its product.[11]

A year later, Traynor inked the last of the three seminal products liability opinions in the unanimous decision of *Vandermark v. Ford Motor Co.*[12] In *Vandermark*, Traynor extended the concept of strict products liability to retailers and distributors "engaged in the business of distributing goods to the public."[13] The substance of Traynor's opinions were incorporated in the Restatement (Second) of Torts in 1964 and the doctrine of strict products liability began to spread throughout the United States.[14]

Throughout the nation, subsequent decisions have held other types of third-parties liable for design or manufacturing defects, including franchisors,[15] corporate successors,[16] and promoters.[17] Other courts have refused to apply strict liability to groups such as used-goods sellers[18] or entities that finance purchases made by others.[19] At times, strict liability reached even bystanders.[20] Regardless of the judicial extension or restraints, the policy justifications set in Traynor's original *Escola* concurrence has held true in the evolution of strict products liability.[21]

And in New York particularly, it was the case of *Porter v. LSB Indus., Inc.* that set the precedent for non-seller strict products liability when it found that the "law of negligence or products liability" depends "on proof that [the] defendant actually designed, manufactured, sold, distributed, or marketed the allegedly defective item[.]"[22] A scope wide enough to capture the evasive e-commerce giant, Amazon.

B. Policy behind Strict Product Liability

When Justice Traynor wrote his *Escola* concurrence, he recognized the need for products liability to evolve alongside the rapid pace of mass production. This foresight was necessary to accommodate the complexity and danger of modernized products. Traynor set out four rationales in support of strict products liability: (1) social responsibility, (2) loss-spreading, (3) administrative costs, and (4) incentives for safer products.

The ensuing subsections, which explain each rationale, have been omitted due to length limitations but will be provided upon request.

C. Adoption of Strict Product liability

While there is no federal statute for strict product liability, most states have adopted some version of the Restatement on strict product liability.[23] The Restatement's interpretation of the law has followed Traynor's policies when it stated that "[o]ne engaged in the business of selling *or otherwise distributing products* who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."[24] As such, the Restatement closely matches the policy intent of Traynor's opinions – extending liability to any party that makes a defective product available to the marketplace.[25]

Opposing scholars have argued that strict product liability "places burdensome costs on manufacturers, prevents vital research and development; it deters businesses from marketing worthwhile products; and courts should defer to the legislature and regulatory agencies instead."[26] Yet despite those criticisms, most states across the U.S. have nevertheless adopted the doctrine; even to circumstances Justice Traynor could never have foreseen.[27]

III. Amazon's Great Escape

Amazon, the now-ubiquitous technology giant, started as an online bookseller out of a garage in 1994.[28] Since then, Amazon has expanded beyond books to provide a massive variety of products, which includes everything from cloud computing with Amazon Web Services to colored highlighters.[29] Amazon's reported revenue in 2020 was more than $386 billion and was estimated to account for 37-49% of online commerce in the United States.[30]

Yet, despite the massive amount of Amazon purchased products circulating the U.S., the judicial consensus had been (until 2019) that Amazon cannot be held liable for defective products sold on its website.[31] Courts have held that Amazon is not a "seller" under state statutory products liability law or common law, and, consequently, absolved Amazon of liability for defective products sold by third party vendors on the Amazon marketplace.[32] However, these holdings have not been consistent with the policies outlined in Traynor's *Escola* concurrence and the resulting evolution of products liability law.[33]

Despite those previous holdings of non-liability, a string of recent cases has tested whether Amazon can be held strictly liable for defective products advertised, purchased, and distributed through its website and fulfillment services. This change started on July 3, 2019, when the Third

Circuit Court of Appeals ruled that Amazon was a "seller" under the Restatement (Second) of Torts and held Amazon strictly liable for a defective dog collar sold and fulfilled by a third party vendor through Amazon's online marketplace.[34] The decision had a rippling effect throughout the country as other federal courts followed suit.[35]

In each of the cases in Part III.B, a consumer purchased a product from Amazon's marketplace and faced significant injury due to a defect in the product.[36] The issue before the courts was to what extent is Amazon liable when considering its involvement in the sale of the defective product. A consideration of Amazon's involvement first requires an understanding of Amazon services and distribution methods.

A. The Amazon Marketplace and its Distribution Methods

1. The Marketplace

Amazon, as an e-commerce company, retails its own products as well as products from over a million third-party vendors through Amazon's online marketplace.[37] These third-party vendors pay Amazon various fees in return for Amazon's placing their products on the marketplace, collecting order information from customers, processing payments, and providing customer support.[38] Third-party vendors benefit in gaining access and exposure to Amazon's consumer base, and Amazon benefits by expanding the products it offers on its site without the cost of investing in additional inventory.[39]

Third-party vendors must assent to Amazon's Services Business Solutions Agreement to use Amazon's services.[40] After assenting, the vendor chooses which products to sell on the marketplace, and provides Amazon with information about the product, including its brand, model, dimensions, and weight.[41] Amazon formats that information into a product listing on its marketplace.[42] But before the vendor's listed product reaches a consumer, it has to be classified as either "Fulfilled by Amazon" ("FBA"), "Fulfilled by Merchant" ("FBM"), or "Seller-Fulfilled Prime" ("SFP").[43]

2. Fulfillment by Amazon (FBA)

When a third-party vendor elects FBA service, the vendor ships their products to Amazon who catalogs, warehouses, packages, and directly ships the product to the customer.[44] Amazon handles the post-sale customer support, which includes around-the-clock inquiry management, refunds and returns.[45] Additionally, the FBA service offers a suite of software services that allows third-party vendors to track sales performance, maintain inventory levels, and launch advertising campaigns.[46] In exchange, Amazon collects sales commission fee, and extensive fulfilment and storage fees.[47] FBA is attractive to vendors because it allows them to save on warehousing and supply-chain logistics costs by having Amazon handle the distribution services.[48]

Most attractive aspect of FBA is that it allows vendors to market their products to Amazon's 153 million "Prime" members.[49] Prime members pay $12.99 per month (or, $119.99 for a discounted yearly payment) to receive a number of benefits, including free 2-day shipping.[50] A 2018 report has estimated that Prime members spend, on average, $1,400 per year on

merchandise bought on Amazon, compared to the $600 yearly spending average of non-Prime customers.[51] For these reasons, more and more vendors are moving towards using FBA over all other services.

3. Fulfillment by Merchant (FBM)

When a third-party vendor packs and ships a product sold through the Amazon marketplace directly to the consumer – with Amazon only handling the payment process – that is FBM service.[52] The drawbacks to FBM are that the vendors must store, package and ship their products, and perform customer service responsibilities, including product returns and exchanges.[53] However, this could be a beneficial arrangement for vendors who can perform these services for itself at a lower cost than Amazon's FBA fees.[54]

FBM makes the most sense for established vendors who have already invested in the requisite infrastructure to handle most of the storing and shipping process.[55] However, research suggest that third-party vendors who choose FBM distribution are at a marketing disadvantage when it comes to the "buy-box" – the white box on the right side of Amazon product detail page, where customers can add items for purchase to their cart.[56] Perhaps the largest disadvantage to choosing FBM distribution is that vendors are not able to market directly to Amazon's high spending Prime members – but vendors can reach those consumers without FBA by opting into SFP distribution.[57]

4. Seller-Fulfilled Prime (SFP)

SFP combines the valuable access to Amazon's high-spending Prime members with the extra control over shipping and warehousing afforded by FBM.[58] Vendors benefit from having access to a substantially increased revenue with access to Prime members, but they must foot the bill for any inventory storage overhead, and shipping and handling costs – which will not be outsourced to Amazon as they would be under FBA.[59]

Qualifying for SFP requires an extensive procedure.[60] Third-party vendors must start by completing a SFP trial period in which they must process orders with a zero-day handling time.[61] Once the trial period is complete, the vendors must offer premium shipping options and ship nearly all (99%) of their orders on time.[62] The vendors have to maintain an order cancellation rate of less than 0.5 percent, use Amazon-approved carriers, and must still allow Amazon to handle all the customer service inquiries.[63] SFP may appear like an attractive compromise, but it is actually the most difficult to maintain of the three services.

B. Survey of Recent Amazon cases and the Implication of Amazon Distribution Methods

Below are cases that demonstrate the emerging trend of holding Amazon liable for defective products sold through its online marketplace; starting in Pennsylvania and reaching New York. Courts started deciding cases involving both FBM and FBA products in a similar fashion even though the amount of contact and control Amazon has exercised with those products differs significantly.[64] However, with the exception of *Oberdorf v. Amazon.com* (FBM service), the predominant fulfillment method used by the third-party vendors in these cases has been FBA.

The sellers' use of Amazon's FBA service has substantially increased Amazon's role in placing the defective product into the consumers' hands.[65] In some cases – beyond just taking charge of warehousing, shipping, and customer support – Amazon has assumed the responsibility of notifying purchasers of potentially hazardous defects in products sold by third-party vendors.[66] Since the inception of the FBA service, Amazon has been financially benefitting from vendors using their services – collecting significant fees, increasing the Prime product offerings, and receiving advertising benefits from shipping third-party products in Amazon-branded boxes and tape – all the while escaping the costs of liability and skirting the hand of justice. But, as will be demonstrated below, this arrangement is bound to change.[67]

1. *Oberdorf v. Amazon.com, Inc.* (Third Circuit Court of Appeals)

The case of *Oberdorf v. Amazon.com, Inc.* provides the first departure from a line of cases in which Amazon escaped strict product liability.[68] In December 2014, Heather Oberdorf logged on to Amazon.com to purchase a collar for her dog, Sadie.[69] The collar was sold by a third-party vendor, The Furry Gang, and shipped directly from the vendor to Oberdorf – using Amazon's FBM service.[70] Just a month later, Oberdorf was walking Sadie when the collar's D-ring – where the leash attaches to the collar – unexpectedly broke and the retractable leash recoiled into Oberdorf's glasses, causing permanent blindness in her left eye.[71]

After the accident, Oberdorf attempted to contact The Furry Gang who listed the collar for sale on Amazon, but the company had evidently disappeared.[72] Unable to find any contact information on the third-party vendor, Oberdorf filed suit against Amazon for strict products liability and negligence.[73] For strict products liability, the Pennsylvania Supreme Court follows Section 402A of the Restatement (Second) of Torts – limiting liability to "sellers" of products.[74] The Third Circuit, applying Pennsylvania law, employed a four-factor test to determine whether a party is a "seller":

> (1) Whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress"
> (2) Whether "imposition of strict liability upon the [actor] serves as an incentive to safety";
> (3) Whether the actor is "in a better position than the consumer to prevent the circulation of defective products"; and
> (4) Whether the actor "can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms."[75]

The court concluded that the first factor weighed in favor finding Amazon liable, since representatives of The Furry Gang could not be reached.[76] Court cited numerous supporting cases in which third-party vendors of products sold on Amazon were unable to be found.[77] The court was troubled to hear the admission of Amazon Vice President of Marketing Business that Amazon takes no precautions to ensure that third-party vendors are in good standing under the laws of their country, nor does Amazon have a vetting process to ensure those vendors are amenable to legal process.[78]

The second factor also favored imposing strict liability on Amazon, since Amazon exerted incredible influence and control over third-party vendors despite not directly controlling the design or manufacturing of their products.[79] The court concluded that Amazon could remove unsafe products from its site at any time, and the imposition of strict liability would compel this proactive behavior.[80]

The third factor, whether Amazon "is in a better position than the consumer to prevent the circulation of defective products," also weighed in favor of finding Amazon strictly liable.[81] By way of example, the court contrasted the profile of an auctioneer that lacks an ongoing relationship with the manufacturer, with that of Amazon that encourages an ongoing (and domineering) relationship with its third-party vendors.[82] Through this ongoing relationship, Amazon receives sufficient reports of defective products and customer feedback to enable it to remove those unsafe products from circulation.[83] And quite notably, Amazon limits the ability of third-party vendors to directly communicate with customers – making it more difficult for those vendors to monitor customer feedback.[84]

Lastly, the court concluded that the fourth factor – loss spreading – weighed in favor of imposing strict product liability.[85] The Amazon services agreement signed by third-party vendors included an indemnification clause allowing Amazon to recoup losses from its vendors.[86] The court also reasoned that Amazon could distribute the added costs of strict liability by collecting a higher commission from vendors for products sold on its website.[87]

The court concluded that strict liability may be imposed on Amazon based on the above four-factor test and other on-point Pennsylvania cases.[88] In particular, the court cited *Hoffman v. Loos & Dilworth*, where a participant in the sales process was held strictly liable despite not having taken title or possession of the products sold.[89] In *Hoffman*, the court imposed liability on a sales agent who transmitted orders from a packager to a distributor – performing a 'tangential' role.[90] In *Obdedorf*, the court concluded that Amazon's role exceeded that of the *Hoffman* sales agent, since Amazon not only accepted and arranged orders for shipment, but also "exert[ed] substantial market control over product sales by restricting product pricing, customer service, and communications with customers."[91]

Most important note to make from this case is not how Amazon was held strictly liable for an FBM product, but that Amazon had been so complacent in allowing third-party vendors to escape accountability for defective products sold through its website.[92] This suggests a need for more effective consumer protection.

2. *Loomis v. Amazon.com, Inc.* (California Court of Appeals)

On April 26, 2021, the California Court of Appeals issued its decision in *Loomis v. Amazon.com LLC*, which had drastic consequences for e-commerce merchants sued under strict liability resulting from defective products sold on their platforms.[93]

In *Loomis*, the plaintiff brought suit against Amazon for injuries she suffered from an allegedly defective hoverboard that was sold by a third-party seller ('TurnUpUp') through the Amazon website.[94] The *Loomis* court noted that "[c]ontrary to Amazon's assertion that it merely provided an online storefront for TurnUpUp and others to sell their wares, it is undisputed that

Amazon placed itself squarely between TurnUpUp, the seller, and Loomis, the buyer, in the transaction at issue."[95] The plaintiff perused the product listings on Amazon's website.[96] Amazon took plaintiff's order and processed her payment.[97] It then transmitted the order to the third-party to package and ship to the customer.[98]

The court was unpersuaded by Amazon's characterization of its marketplace as an online mall providing online storefronts.[99] Rather, owners of malls typically do not serve as conduits for payment and communication in each transaction between a buyer and seller, and typically the space – not charge per-item fees.[100]

The *Loomis* court relied on another recent decision from the California Court of Appeal, *Bolger v. Amazon.com, LLC*, wherein the court held that Amazon "is an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."[101] The *Bolger* court returned to the underlying principles etched out in Traynor's *Escola* concurrence, and explained how the scope of strict liability must expand to account for the "market realities" of "today's business world."[102]

Ultimately, the *Loomis* court found that Amazon's actions of "(1) interacting with the customer, (2) taking the order, (3) processing the order to the third party seller, (4) collecting the money, and (5) being paid a percentage of the sale—are consistent with a retailer or a distributor of consumer goods."[103] The court thus held that, because Amazon was "pivotal" in bringing the product to the consumer, it could be held strictly liable for defective products.[104]

3. *Eberhart v. Amazon.com, Inc.* (New York District Court)

Our first case in New York is *Eberhart v. Amazon.com, Inc.*, where the plaintiff-consumer ordered a French press coffeemaker that was displayed for sale by third-party vendor on Amazon's website using the FBA service.[105] The plaintiff alleged that while washing the coffeepot – labeled as the "CoffeeGet 6 cup 27 oz. French Press Coffee Maker with thick heat resistant glass" – the glass shattered and caused significant lacerations to his hand, resulting in permanent nerve damage.[106] Though the third-party vendor paid Amazon for the FBA services of warehousing, packaging and delivering its products to the consumer directly, the court noted that Amazon never took title of the coffeemaker, nor did it write, edit, or substantively review the information contained on the product detail page it hosted on its website.[107]

The law in New York, as in Pennsylvania and California, is that a "manufacturer of defective products . . . may be held strictly liable for injuries caused by its products, regardless of privity, foreseeability, or due care," and that liability is extended to "certain sellers, such as retailers and distributors."[108] Although the *Eberhart* court cited a New York case that identified the lack of a concrete definition for "distributor" as it applies to strict products liability, it nevertheless ruled that "the failure to take title to a product places an entity on the outside [of the distribution chain]."[109]

The *Eberhart* court conceded that the new Restatement (Third) of Torts: Products Liability did not include a title requirement. However, the court nevertheless dismissed this complication by stating that "the Restatement excludes 'product distribution facilitators' . . . – such as advertisers, sales personnel, and auctioneers – from the definition of distributors."[110] Amazon's

relationship to the distribution of the defective coffeemaker, however, goes far beyond the exclusions stated in the Restatement, and the *Eberhart* court's reliance on a title requirement is misplaced.[111] The misapplied legal foundation in this case, as well as other cases facing the issue of title, is merely the disturbing fountainhead to the eventual erosion of the strict products liability regime in the modern economy and the rebuild of the Citadel.[112]

4. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.* (A Return to New York)

This section of the paper has been omitted due to length limitations but will be provided upon request.

IV. The Second Falling of the Citadel

A. Legal Considerations

The model of accountability avoidance was working well for Amazon until that fateful day when the Third Circuit Court of Appeals in *Oberdorf* found that Amazon could be considered a "seller" and held it strictly liable as a member of the distribution chain. This is so in spite of the fact that the defective product was sold by a third-party vendor using the FBM service.[113] Twenty days later, the U.S. District Court for the Western District of Wisconsin in *State Farm Fire & Casualty Co. v. Amazon.com, Inc.* ruled similarly against Amazon finding that it was properly considered a "seller."[114] The decisions reverberated throughout the strict products liability landscape, with one commentator calling the result "legal fireworks."[115] Nevertheless, Amazon is holding steadfast in states that require a transfer of title as a prerequisite for strict liability.[116]

Amazon's legal strategy to avoid liability for injuries caused by defective products sold through its third-party vendors has remained consistent and is premised on three defenses: (1) Amazon is merely an online marketplace and does not exercise sufficient control over the products of third-party vendors during the manufacturing, distributing, or retail phase to be considered a seller; (2) the Communications Decency Act's Section 230 bars claims of strict product liability; and (3) Amazon does not take title to or transfer title of products sold by third-party vendors.[117]

Before the new trend reversal, courts had routinely understated Amazon's involvement in placing defective products into the consumer market.[118] Those courts were also problematically fixated on the idea that Amazon must have taken title to the defective product in order for it to be found strictly liable for injuries resulting from those products.[119] Let's consider some of the legal issues involved.

1. Is Amazon merely an Online Marketplace?

When analyzing's Amazon's potential liability, the most troublesome mistake the *Eberhart* court made was citing *Oberdorf* to support the contention that Amazon is merely an online marketplace – playing a role analogous to that of an auctioneer, broker, newspaper classified-ads section, or a mall.[120] Those analogies may work when the third-party vendors are

using Amazon's FBM service, but are untenable when those vendors utilize Amazon's FBA service.

It is unmistakable that Amazon's direct involvement in the introduction of FBA products into the common marketplace is far greater than the examples alluded to in *Oberdorf*.[121] In *Oberdorf*, Amazon had no physical interaction with the defective dog leash, and its role did not extend further than providing a platform for The Fury Gang to list its product to potential buyers.[122] This can be analogized to the service provided by Craigslist, Ebay.com, or a traditional newspaper classified ads section.[123] However, "it is a grievous error to treat this analysis of Amazon's role in FBM transactions as a blanket generalization applicable to Amazon's role in SFP or FBA transactions."[124] Clearly, Amazon is more involved and receives more benefit when it facilitates distribution of FBA products.[125]

When compared to other online auctioneers (like eBay.com), Amazon is clearly distinguishable in its distribution methods and interface.[126] eBay is actually similar to an auctioneer having minimal interface with vendors, low involvement in third-party vendor transactions, and requires interactivity on the part of buyers placing active bids.[127] Most notably, the sellers' information is prominently located next to the bidding area in eBay's user interface; erstwhile, Amazon tucks away – in small-type and buried in an information-dense area of user-interface – a reductive display of "Sold by [Seller] and Fulfilled by Amazon."[128]

When compared to online classified ad services, such as Craigslist, Amazon is again clearly distinguishable.[129] Although seller information is not directly available to customers through Craigslist, the means to reach the seller are available, unlike on Amazon where customer service requests and inquiries go through Amazon's around-the-clock customer support.[130] The nonprofessional listing on Craigslist make clear that Craigslist itself is not a seller, whereas Amazon branding springs throughout the Amazon website, its packages, and, not surprisingly, the duct tape.[131]

Apart from these general distinctions, the fact remains that Amazon is not merely an online marketplace.[132] For one, its physical reach is extensive, owning or leasing more than 250 million square feet of space, including space for warehousing, fulfillment centers, and, as of recently, brick and mortar stores.[133] The U.S. Department of Commerce has found that Amazon accounts for more than half of e-commerce sales, and nearly thirteen percent of total retail sales in the U.S.[134] Amazon has been increasingly involved in the delivery of products – taking on the role of a common carrier.[135] It has even been developing drone delivery capabilities.[136]

In sum, the lasting applicability of old-media comparisons or pre-internet age analogies is tenuous; the integration of the modern economy with internet services is continuous and unlikely to regress.[137] It is important that the courts do not parse language to cleave a large and growing section of the economy out of the American strict products liability regime.[138] Exempting e-commerce giants like Amazon, while still imposing it on other entities with comparable roles in the distribution of potentially defective products (e.g. retailers like Walmart and Best Buy) raises substantial horizontal equity concerns that could have drastic long-term consequences.[139]

2. Losing Refuge of the CDA

Amazon has deployed a defense strategy to avoid strict liability by asserting it has immunity under Section 230 of the Communications Decency Act ("CDA").[140] By way of background, Section 230 was enacted in the mid-90s "to promote the continued development of the Internet and other interactive computer services and other interactive media . . . unfettered by Federal or State regulation."[141] To that end, Congress directed that no provider of an "interactive computer service" can be treated as the publisher of any content originating from a third-party user of their platform.[142] Thus, argues Amazon, courts need not reach the merits of strict liability question given that its role is merely allowing merchants to post their product offerings to its marketplace – bringing it within the broad umbrella of Section 230's protections.[143]

While such a sweeping interpretation of Section 230 has its supporters, it has found little traction in courts so far.[144] The Section 230 defense has lost steam for the straightforward reason that the CDA was never meant to protect persons from claims that do not "derive from the defendant's status or conduct as a 'publisher or speaker.'"[145] To date, no judge has taken Amazon up on its suggestion that these cases should be resolved on Section 230 grounds, and only two have even suggested (albeit in dicta) that Amazon's interpretation of Section 230 is correct.[146]

This defense may apply where the speech provided by the vendor is at issue or in cases of failure to warn, but courts have started to dispense with the notion that CDA bars all claims associated with defective third-party products sold on Amazon's website.[147] As the Tenth Circuit Court of Appeals articulated in *FTC v. Accusearch, Inc.*, courts are unwilling to "immunize a party's conduct outside the realm of the Internet because it relates to the publishing of information on the Internet."[148] And Amazon's immunity has run to its end.

3. The Improper Fixation on "Title"

The most onery of Amazon's defenses, that has proven effective in some states, is the requirement of title to be considered a seller.[149] As was seen in *Eberhart*, Amazon argued that it did not take legal title to the products sold by the third-party vendors, and should not be held accountable.[150] Although not all states require the taking and transferring of title as a prerequisite for liability as a seller, those that do present a monumental obstacle to recovery for injured plaintiffs. [151] Those plaintiffs have faced great difficulty in pinning liability on Amazon when it never formally took title to the goods that were sold.[152]

However, the ruling in *Eberhart* – as in other similar cases – of a title requirement is a misguided application of the law.[153] Any such requirement to subject a retailer or distributor to strict liability is absent from products liability statutes, the Restatement and relevant case law.[154] In particular, guidance from courts and treatises emphasize the *responsibility* of entities introducing defective products into the channels of commerce, not their *ownership of title.* In fact, licensors, franchisors and lessors have been found strictly liable for selling defective products while being merely transient possessors of the products – never taking legal title.[155]

The *Eberhart* court had defended that title requirement on the grounds that the "vast majority of opinions" in New York refer to distributors only in the context of an entity who in-

fact sold the defective product.[156] The issue with this reasoning is that just because there have only been opinions holding distributors who have taken title to a defective product strictly liable, *does not necessarily* preclude entities that have not taken title.[157] In fact, the plain language of the Restatement and precedent in other jurisdictions supports the assertion that distributors *do* include entities that have not taken title.[158] This is specifically true in New York, where merely a year later, the *State Farm Fire & Cas. Co* court found Amazon strictly liable for a defective thermostat for which Amazon never held title to.[159]

This outsized fixation on a requirement that an entity must hold title to a defective product is improper given prior case law which distinguishes title as merely one factor among many in determining whether strict liability is appropriate.[160] The most appropriate legal conclusion is that Amazon should be held strictly liable for third-party products fulfilled by its FBA service given Amazon's extensive and inextricable role in directly facilitating the distribution of those defective products.[161] Otherwise, this problematic misinterpretation of the law serves as a troubling precursor to the judicial indifference toward the policy underpinnings of strict products liability law espoused by Traynor's triumvirate.[162]

B. Policy Considerations

The law of strict product liability has always been grounded in what one commentator described as "pragmatic instrumentalism": a blend of policy considerations, institutional economics, and other concerns about the social significance of legal outcomes.[163] Even the doctrine's most vocal critics seem to accept this outcome-focused orientation, directing their critiques on whether it is the most efficient or effective means to those ends.[164] Thus, when it comes to whether Amazon falls within the metes and bounds of products liability, courts ought to begin with the policy question of whether it *should*.[165]

The holdings in the four Amazon cases described in Part III understates the importance of the larger policy goals of tort law and marks the hesitancy of its natural evolution in tandem with the evolution of a modernizing and digital economy.[166] The policy shift that started with *MacPherson* and *Escola* was a response to the changing economy of the twentieth century.[167] In cases like *Eberhart* and its predecessors, courts have failed to recognize the outside role of e-commerce and online retail in the modern economy, as well as Amazon's specific role in placing potentially defective products into the stream of commerce.[168] But that myopia is untenable, and, similar to *Oberdorf*, *Loomis,* and *State Farm Fire & Cas.*, other courts will begin to restore strict products liability's trajectory and realign it with the policies that underpin it.

1. Incentivizing a Safer Marketplace for Amazon Shoppers

One the most common rationales given for strict products liability is that it tends to promote product safety.[169] Whether the liability regime actually incentivizes the production of safer products can be debated.[170] Some industries like automotive has seen some correlation between the imposition of more stringent strict products liability and the increased safety in those products over time.[171] Notwithstanding the lack of absolute empirical evidence to support or refute this policy objective, the incentivization of a safer marketplace for consumers is one of the

most important justifications in support of strict products liability and the overarching deterrent goal of tort law generally.[172]

The traditional analysis to determine strict products liability without recognizing the new market realities has had a perverse impact on product safety in online marketplaces like Amazon.com.[173] The effect is inversely and directly proportional: Amazon maintains as little involvement with third-party products as possible to avoid being found a "seller" under the law, which in turn allows those poorly vetted vendors to proliferate dangerous products on Amazon's website.[174] The continuous punting of responsibility operates to liberate Amazon from what would otherwise be a significant incentive to meaningfully police its marketplace.[175]

Amazon is possibly better situated to efficiently incentivize a safer internet marketplace than any other entity in the modern e-commerce system.[176] Amazon has already shown promise in this area with their Services Business Solutions Agreement that provides an encouraging framework for ensuring that third-party vendors can be held accountable to Amazon's shoppers.[177] For instance, it already requires those vendors to indemnify Amazon in the event of a suit resulting from one of their products.[178] Additionally, third-party vendors must promise to Amazon that they are a duly and legally organized business and that all their information is accurate and true.[179] But unfortunately, the reality is that the Business Solutions Agreement exists primarily to serve Amazon's interest in shielding itself from any liability stemming from their vendors' products.[180] And it is only roughly enforced to ensure that those vendors are legally reachable by Amazon and its customers.[181]

The path forward for Amazon and its customers is for Amazon to strengthen and enforce their Business Solutions Services Agreement's terms to ensure that their third-party vendors can be reached and held accountable.[182] Additionally, Amazon possess a great deal of leverage to exert pressure on its vendors to verify the quality, legitimacy and safety of the products they sell on Amazon.[183] As the New York's highest courted noted in its ruling in *Sukljian v. Ross Son Co.*:

> Where products are sold in the normal course of business, sellers, by reason of their continuing relationships with manufacturers, are most often in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings, or through contribution or indemnification in litigation; additionally, by marketing the products as a regular part of their business such sellers may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods.[184]

Amazon holds that position with its vendors. With any luck, Amazon's influence would significantly hinder the sale of dangerous products such as the thermostat that burned down the plaintiff's home in *State Farm Fire & Cas.*[185] Instead of placing profit above safety, Amazon should increase its oversight authority to ensure their vendors comply with the Business Solutions Agreement and any additional measures to ensure vendors are held accountable for their products.[186]

2. Profit and Benefit: Amazon's Social Responsibility

In *Escola*, Justice Traynor emphasized the social importance of placing losses from defective products with the parties responsible for introducing them in the market.[187] In the Part III cases, except for *Oberdorf*, Amazon played an intimate role in the overall distribution of the defective products when providing FBA services.[188] The question becomes whether their involvement and role is sufficient to impose liability.

The Restatement extends strict liability for defective products to all "nonmanufacturing sellers or distributors" of those products.[189] In New York, any person or entity in the chain of distribution is a potential defendant in New York, especially in strict products liability.[190] The Restatement does exempt "product distribution facilitators" who are those that "indirectly [facilitate] the commercial distribution of products."[191] As illustration of exempted entities, the Restatement cites advertising firms, auctioneers, financing companies and sales representatives.[192] However, Amazon is clearly distinguishable from the type of entities the Restatement exempts as "[indirect] distribution facilitators."[193] As explained in Part IV Section A. (1), Amazon has significant leverage over their vendors and is acutely embroiled in the distribution chain.

Before 1998, when the products liability Restatement was last revised, Amazon had been a fledgling public company selling only books.[194] Amazon Prime and the FBA service wasn't launched until 2006.[195] Since then, Amazon has defied the traditional notions of what a "distributor" might look like, and has played in an integral role in the distribution – compelling the imposition of strict products liability.[196] The California Court of Appeals in *Kasel v. Remingtom Arms Co.* has justified this imposition by stating that it "is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise which created consumer demand for and reliance upon the product which calls for imposition of strict liability."[197] The "personal profit or benefit" of Amazon is clear when their role in the distribution is examined.[198]

Given Amazon's rapid expansion in the past decade, it has undoubtedly benefited financially and by reputation from its role in placing defecting products into the stream of commerce – especially through their FBA service.[199] Other than collecting warehousing and order fulfilment fees from vendors, Amazon has benefit from increase website traffic, marketing benefits in brand recognition, and increased subscribers to their Prime membership.[200]

The "Prime" designation (available only through their FBA and SFP service) is seen as an implicit endorsement of quality of the items being sold, and reliance on that reputation is not unreasonable.[201] Actually, surveys have shown that Amazon is one of America's most trusted and beloved companies.[202] Amazon positive reputation has continued to grow from timely fulfilling customer orders for third-party defective products.[203] It is high time courts take account of these unchecked profits and apportion Amazon with some responsibility.

3. Algorithms and Available Information: A Reduction of Administrative Costs

As explained in Section B. (3) of Part II, an important justification for imposing strict product liability is to relieve the time-consuming and costly process of discovery on the injured plaintiffs who are rarely equipped with the needed evidence or expertise to show a lack of due care in the manufacturing process.[204] This justification is most compelling when one considers Amazon's actions towards their vendors who use the FBA service. Specifically, Amazon has deliberately reduced their platform's user interface to make the information about FBA sellers difficult to discern, with the site only displaying the name of the actual seller "in small-type under the area indicating whether the item is in stock or not, buried in an information-dense area of the user-interface called the 'buy-box.'"[205] This has more than just created a discovery burden to seek knowledge of the manufacturing process, but it has also stripped plaintiffs of the opportunity to learn who those vendors even are.

Furthermore, Amazon has continued a practice of commingling inventory at its warehouses which means that "a product ordered from a third-party seller may not [even] have originated from that particular seller."[206] Thus, without the imposition of strict products liability, customers would be left with the dual burden of uncovering the identity of obscured vendors and tracing defective products' perplexing distribution journeys to their homes.

Fortunately, instead of taking this circuitous route, Judge Traynor would simply skip this step and impose strict liability when the product is defective, thus reducing the administrative costs associated with resolving the case.[207] That cost would shift to Amazon who is markedly more capable of shouldering it with the available information it holds. Amazon can study and probe their vendors' manufacturing processes and history before listing their products. Actually, with its complex algorithms and machine learning tools, Amazon may even be better equipped than those vendors at identifying suspicious products.

4. Spreading Losses Equitably

Courts do not often place the obligation of ensuring safe products on retailers.[208] However, when strict products liability has been imposed on retailers, the courts have primarily contended that the retailers are often in control of the product price, and are in a position well-suited to adjust prices to compensate for potential liability.[209]

The court in *Eberhart* pointed out that Amazon was not in control of the third-party vendors' products.[210] Although it is technically true that Amazon does not *directly* set the price, Amazon nevertheless exerts significant influence over those prices by collecting selling fees, per-item fees, referral fees and subscription fees.[211] These fees are often computed as a percentage of the total purchase price from the vendors.[212] And though traditional retailers might directly set the price after computing their own markup, Amazon indirectly sets the price by charging predictable fees that allow the vendors to set the overall product price after accounting for Amazon's share and the vendor's desired markup.[213] Thus, as a traditional retailer, Amazon is well-situated to adjust the prices of its fees to compensate for potential liability.[214] The

concern expressed in *Eberhart* is misguided with respect to Amazon's perceived lack of price controls – if anything, Amazon exerts considerable influence.[215]

Regardless of price controls, Amazon is still able to retain product insurance like retailers, for which courts have understood to advance the policy goal of loss-spreading.[216] Undoubtedly, if Amazon carries general liability insurance, the likelihood of plaintiff recovery is greatly increased; especially when the third-party vendor is a small business with little to no assets.[217] Amazon can tack on insurance fees to the other fees they charge their vendors for using FBA and SFP service. Additionally, because Amazon Prime members already benefit from faster product access fulfilled through FBA or SFP service, Amazon can increase their membership costs to cover some of the defective products liability costs Amazon might incur through its role in directly facilitating the distribution of third-party products.[218]

In sum, Amazon has multiple means of guaranteeing some degree of indemnification – however indirect – from third-party vendors that are unable or unavailable to be held accountable for injures resulting from defective products they sold through Amazon's marketplace.[219] Applying strict liability to Amazon advances Prosser's policy rationale that "[t]he public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products."[220]

V. Conclusion

Holding Amazon strictly liable for every potentially defective product on its site is impractical.[221] The number of products listed on its U.S. marketplace alone far exceeds 500 million separate listings.[222] Amazon is already held strictly liable for defective products sold under its own name, and it should not be held strictly liable for third-party products distributed by the FBM method – certainly when Amazon's contact with the product is limited and its overall responsibility in placing the product in the market is minimal.[223] However, when it comes to defective products sold through its FBA service, it is problematic not to hold Amazon strictly liable for the resulting injuries on plaintiffs left without remedy.

The distribution chain analysis employed in *Eberhart* and other courts, that allow Amazon to escape liability, no longer make sense in the modern economy. Tort law should continue to evolve to match the new realities of online shopping and remain loyal to the policy motivations behind strict products liability. A policy that is not routed in the dynamics of chain analysis but focused on determining the degree to which any given entity is responsible for placing a defective product into the marketplace.[224]

Amazon's involvement in third-party vended transactions using FBA service is extensive. Vendors pay Amazon various fees, including a subscription fee (either $39.99 per-month or $0.99 per-item) and a per transaction fee.[225] Though vendors set their own prices and write their own product descriptions, Amazon displays those products under a single product detail page to "present customers with the best experience."[226] For these combined listings, Amazon uses its proprietary ranking algorithms to determine which vendor's product appears in the page's "Buy Box"—a designation that leads to 82% of the site's sales.[227] This is tantamount to deciding which product will be featured on which store aisle for best sales. And similar to retailers,

Amazon serves as an intermediary for all communications and distribution between customers and vendors.[228]

To the extent Amazon's FBA role is comparable to the role of traditional brick-and-mortar retailers in supplying potentially defective products into the market, Amazon should be held to a comparable legal standard of accountability.[229] Not holding Amazon strictly liable raises substantial questions regarding the overarching policy goals of tort law expressed in *Escola*, including deterrence, loss distribution, corrective justice, and social responsibility.[230] From a policy and legal perspective, courts need to refocus their inquiry on the original objectives of the American strict products liability regime and be willing to allow the law to continue to evolve in tandem with the modern economy.

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[1] Sean M. Bender, *Article: Product Liability's Amazon Problem*, 4 Tex. J. L. & Tech. 95, 95 (2020).
[2] *Id.*
[3] *Id.*
[4] *Id.* at 100.
[5] *Id.*
[6] *See Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944).
[7] *See id.* (emphasis added).
[8] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 186 (2019); *see also, e.g.*, *Putman v. Erie City Mfg. Co.*, 338 F.2d 911, 920-21 (5th Cir. 1964) (approving of Traynor's concurrence in *Escola*).
[9] *Greenman v. Yuba Power Prod.*, 377 P.2d 897 (Cal. 1963).
[10] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 187 (2019), *quoting Greenman v. Yuba Power Prod.*, 377 P.2d 897, 901 (Cal. 1963).
[11] *Id.*
[12] *Vandermark v. Ford Motor*, 291 P.2d 168 (Cal. 1964).
[13] *See id.* at 171-72.
[14] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 188 (2019); *see also* Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 577-79 (2014).
[15] *See Kosters v. Seven-Up Co.*, 595 F.2d 347, 351 (6th Cir. 1979).
[16] *See Ray v. Alad Corp.*, 560 P.2d 3, 11 (Cal. 1977).
[17] *See McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967).
[18] *See Tillman v. Vance Equip. Co.*, 596 P.2d 1299, 1303 (Or. 1979).
[19] *See Nath v. Nat'l Equip. Leasing Corp.*, 438 A.2d 633 (Pa. 1981) (refusing to apply strict liability by a plaintiff worker who injured hand in the machine his employer had financed through the defendant).
[20] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 188 (2019); *See, e.g.*, *Elmore v. Am. Motors Corp.*, 451 P.2d 84, 89 (Cal. 1969) ("If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable …. The public policy which protects the driver and passenger of the car should also protect the bystander, and where a driver or passenger of another car is injured due to defects in the manufacture of an automobile and without any fault of their own, they may recover from the manufacturer ....").
[21] *Id.* at 189.
[22] *Porter v. LSB Indus., Inc.*, 192 AD2d 205, 211, 600 N.Y.S.2d 867 (Fourth Dept. 1993).
[23] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 191 (2019).
[24] *Id. quoting* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (AM. LAW INST. 1998).
[25] *Id.* at 191-192.

[26] Zoe Gillies, *NOTE: Amazon Marketplace and Third-Party Sellers: The Battle over Strict Product Liability*, 54 SUFFOLK U. L. REV. 87, 91 (2021) *quoting* Zachary M. DuGan*, Comment, 3-D Printing & Products Liability Law: Are Individuals Printing Themselves into Strict Products Liability?,* 26 Widener L.J. 187, 201 (2017).
[27] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 331 (2020).
[28] *Id.* at 332.
[29] *Id.*
[30] *Id.* at 333 *citing* Matt Day & Spencer Soper, *Amazon U.S. Online Market Share Estimate Cut to 38% from 47%*, BLOOMBERG (June 13, 2019, 3:44 PM), https://bloom.bg/31AQngf.
[31] *Id.*
[32] *Id. citing Erie Ins. Co. v. Amazon.com Inc.,* 925 F.3d 135, 144 (4th Cir. 2019)*; see also Fox v. Amazon.com Inc.,* 930 F.3d 415, 425 (6th Cir. 2019) (affirming Amazon is not a "seller" but reversing on other grounds).
[33] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 192 (2019).
[34] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 334 (2020) *citing Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 153 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).
[35] *See*, *e.g.*, *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp 3d 964, 974 (W.D. Wis. 2019); *Papataros v. Amazon.com, Inc.*, No. 17-9836 (KM) (MAR), 2019 U.S. Dist. LEXIS 144253, *44-45 (D.N.J. Aug. 26, 2019) *stayed pending reh'g of Oberdorf by the Third Circuit*, 2019 U.S. Dist. LEXIS 170537 (D.N.J. Sep. 3, 2019).
[36] Zoe Gillies, *NOTE: Amazon Marketplace and Third-Party Sellers: The Battle over Strict Product Liability*, 54 SUFFOLK U. L. REV. 87, 93 (2021).
[37] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 332 (2020).
[38] *Id. citing Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 141 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).
[39] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 193 (2019) *citing* Reuters, *Amazon's Third-Party Sellers Had Record-Breaking Sales in 2016*, FORTUNE (Jan. 4, 2017), http://fortune.com/2017/01/04/amazon-marketplace-sales/.
[40] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 332 (2020) *citing Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 141 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).
[41] *Id.*
[42] *Id.*
[43] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 193 (2019) *citing* Fulfillment by Amazon, AMAZON, https://amzn.to/2V5FDCG (last visited Mar. 5, 2019).
[44] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 193 (2019).
[45] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 333 (2020).
[46] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 193 (2019).
[47] *Id.*
[48] *Id.*
[49] *See* Don Davis, *Most Amazon shoppers have eyes only for Amazon*, Digital Commerce 360, Nov. 3, 2021, https://www.digitalcommerce360.com/article/amazon-prime-membership/.
[50] *Id.*
[51] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 193 (2019) *citing Amazon Prime Membership Growth Slows*, CONSUMER INTEL. RES. PARTNERS (July 20, 2018), https://www.cirpllc.com/blog/2018/9/25/amazon-prime-membership-growth-slows.
[52] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 333 (2020).
[53] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 196 (2019).
[54] *Id.*

[55] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 333 (2020).
[56] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 195 (2019) (The "buy-box" is the area on an Amazon product page that includes the "Add to Cart" button and the information surrounding it. When a third-party vendor is said to have "won" the buy-box, it means that when a purchaser clicks "Add to Cart," the winning third-party vendor's product will be automatically placed in the purchaser's cart before other third-party vendors' products will. All other products sold by third-party sellers are grouped into a link that says "[x number] new from [$x price]," which leads to a listing of all third-party vendors offering that particular product.)
[57] *Id.* at 196.
[58] *Id. citing Seller Fulfilled Prime*, AMAZON, https://services.amazon.com/services/seller-fulfilled-prime.html (last visited Feb. 13, 2019).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 334 (2020) *citing Erie Ins. Co. v. Amazon.com Inc.,* 925 F.3d 135, 144 (4th Cir. 2019*)* (order fulfilled by Amazon, but Amazon not held strictly liable)*; Garber v. Amazon.com, Inc.,* 380 F. Supp. 3d 766, 773 (N.D. Ill. 2019) (order fulfilled by merchant and Amazon not held strictly liable).
[65] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 197 (2019).
[66] *Id.*
[67] *Id.*
[68] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 338 (2020); *see Carpenter v. Amazon.com, Inc.,* No. 17-cv-03221-JST, 2019 U.S. Dist. LEXIS 45317, at *2 (N.D. Cal. Mar. 19, 2019); *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766, 773 (N.D. Ill. 2019) (order fulfilled by merchant and Amazon not held strictly liable); *Erie Ins. Co.,* 925 F.3d at 144 (order fulfilled by Amazon, but Amazon not held strictly liable).
[69] *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 140 (3d Cir. 2019).
[70] *Id.*
[71] *Id.*
[72] Margaret E. Dillaway, *NOTE: The New "Web-Stream" of Commerce: Amazon and the Necessity of Strict Products Liability for Online Marketplaces*, 74 VAND. L. REV. 187, 188 (Jan. 2021).
[73] *Id.* at 189.
[74] *Oberdorf v. Amazon.com Inc.,* 930 F.3d 136, 140 (3d Cir. 2019)*, vacated and reh'g en banc granted,* 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc).
[75] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 341 (2020) *citing Oberdorf v. Amazon.com Inc.,* 930 F.3d 136, 142 (3d Cir. 2019)*, vacated and reh'g en banc granted,* 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 342.
[86] *Id.*
[87] *Id.*
[88] *Id.*

[89] *Id. citing Hoffman v. Loos & Dilworth, Inc*., 452 A.2d 1349, 1355 (Pa. Super. Ct. 1982).
[90] *Id.*
[91] *Id. citing Oberdorf v. Amazon.com Inc.,* 930 F.3d 136, 149 (3d Cir. 2019)*, vacated and reh'g en banc granted,* 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc).
[92] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 199 (2019).
[93] *Loomis v. Amazon.com LLC*, 63 Cal. App. 5th 466 (Cal. Ct. App. 2021).
[94] *Id.* at 471.
[95] *Id.* at 480.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 481.
[100] *Id.*
[101] *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020).
[102] *Id.*, *quoting Price v. Shell Oil Co.*, 85 Cal. Rptr. 178, 466 P.2d 722 (1970).
[103] *Loomis v. Amazon.com LLC*, 63 Cal. App. 5th 466, 481 (Cal. Ct. App. 2021).
[104] *Id.* at 478.
[105] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 205 (2019) *citing Eberhart v. Amazon.com, Inc.,* 325 F. Supp. 3d 393, 395 (S.D.N.Y. 2018).
[106] *Eberhart*, 325 F. Supp. 3d at 395.
[107] *Id.* at 395-96
[108] *Id.* at 397.
[109] *Id.* at 398 (New York case cited was *McCormack v. Safety-Kleen Sys., Inc.*, No. 110733/10, 2011 WL 1643590, at *4 (N.Y. Sup. Ct. Apr. 5, 2011)).
[110] *Id.* (internal citations omitted).
[111] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 205 (2019).
[112] *Id.*
[113] Aaron Doyer, *NOTE AND COMMENT: Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J. L. & Pol'y 719, 723 (2020).
[114] *Id. citing State Farm & Cas. Co. v. Amzon.com Inc.,* 390 F. Supp 3d 964, 974 (W. D. Wis. 2019).
[115] *Id. citing* Michael Hoenig, *Is Products Liability Closing in on Amazon?* N.T. L.J. (Aug. 9, 2019).
[116] *Id.*
[117] Aaron Doyer, *NOTE AND COMMENT: Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J. L. & Pol'y 719, 725 (2020).
[118] *See Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197, at *10 (D.N.J. July 24, 2018); *Fox v. Amazon.com, Inc.*, No. 3:16-CV-03013, 2018 WL 2431628, at *7 (M.D. Tenn. May 30, 2018); *Eberhart*, 325 F. Supp. 3d at 399.
[119] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 207 (2019).
[120] *Id.; see also State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc.*, 137 N.Y.S.3d 884 (Ct. Cl. 2020).
[121] *Id. citing Oberdorf v. Amazon.com Inc.,* 930 F.3d 136, 149 (3d Cir. 2019)*, vacated and reh'g en banc granted,* 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc).
[122] *Id.*
[123] *Id.*
[124] *Id.* at 208.
[125] *Id.*
[126] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 208 (2019).
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*

[131] *Id.*
[132] *Id.*
[133] *Id.* at 209.
[134] *Id.* at 210.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 211.
[138] *Id.*
[139] *Id.*
[140] Sean M. Bender, *Article: Product Liability's Amazon Problem*, 4 Tex. J. L. & Tech. 95, 118 (2020).
[141] *Id. citing* 47 U.S.C. § 230(b) (2020).
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 208 (2019) *citing Oberdorf,* 930 F.3d at 152. Who in turn is quoting from *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).
[146] Sean M. Bender, *Article: Product Liability's Amazon Problem*, 4 Tex. J. L. & Tech. 95, 118 (2020).
[147] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 208 (2019) *citing Papatros v. Amazon.com, Inc.*, No. 17-179836(KM)(MAH), 2019 U.S. Dist. LEXIS 144253, at *45-47 (D. N.J. Aug. 26, 2019).
[148] *Id. citing FTC v. Accusearch, Inc.*, 570 F.3d 1197 (10th Cir. 2009).
[149] Aaron Doyer, *NOTE AND COMMENT: Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J. L. & Pol'y 719, 727 (2020).
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 211 (2019).
[154] *Id. citing* N.J. STAT. ANN. § 2A:58C-8 (2020); TENN. CODE ANN. § 29-28-102(7) (2020); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., supra note 1; *Barth v. B.F. Goodrich Tire Co.*, 71 Cal. Rptr. 306, 320-21 (Cal. Ct. App. 1968) (holding that "neither the transfer of title to the goods nor a sale is required" for the application of the doctrine of strict liability); *Michalko v. Cooke Color & Chem. Corp.*, 451 A.2d 179, 186-87 (N.J. 1982) ("[Courts] have clearly rejected the requirement that a technical sale occur before strict liability will be imposed.") (*citing* Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 778-79 (N.J. 1965)); *cf. Gray Line Co. v. Goodyear Tire & Rubber Co.*, 280 F.2d 294 (9th Cir. 1960) (holding a tire company, which never transferred title to the defective tire, liable to the plaintiff bus company for injuries resulting from use of the tire); *Greyhound Corp. v. Brown*, 113 So.2d 916 (Ala. 1959) (holding a tire company, which never transferred title to the defective tire, liable to the plaintiff bus company for injuries resulting from use of the tire); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965) (holding a lessor liable for injuries resulting from a defective product it leased to the plaintiff's employer); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967) (holding that a formal sale is not required to impose strict liability) ("One who delivers an advertising sample to another with the expectation of profiting therefrom through future sales is in the same position as one who sells the product.").
[155] 1 Products Liability Practice Guide § 8.03 (2021)
[156] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 212 (2019) *citing Eberhart,* 325 F. Supp. 3d at 398-400.
[157] *Id.*
[158] *Id.*
[159] *See supra* Part 2(B)(3) (description of the case).
[160] *Id.* at 214 *citing Straley v. United States*, 887 F. Supp. 728 (D.N.J. 1995) (applying New Jersey law) (holding that an entity that actually took title to a truck before selling it was a "seller" within the meaning of New Jersey products liability law); *Agurto v. Guhr*, 887 A.2d 159, 163 (N.J. Super. Ct. App. Div. 2005) ("Strict liability may also apply to a broker who takes possession of goods, or exercises control over them, and then transfers them to a buyer.").
[161] *Id. citing Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197, at *7 (D.N.J. July 24, 2018) (illustrating that, specifically, even though it did not actually take title of the defective laptop battery, Amazon

distributed, packaged, labeled, marketed, and otherwise was involved in the placing of the battery in the line of commerce); *cf.* N.J. STAT. ANN. § 2A:58C-8(7) (2018) (see supra note 106 for the full text of the statute).
[162] *Id.*
[163] Sean M. Bender, *Article: Product Liability's Amazon Problem*, 4 Tex. J. L. & Tech. 95, 126 (2020).
[164] *Id.*
[165] *Id.*
[166] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 215 (2019).
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 216 *citing* Andrew F. Popper*, In Defense of Deterrence,* 75 ALB. L. REV. 181 (2011*)*; *Jennifer H. Arlen*, *Compensation Systems and Efficient Deterrence,* 52 MD. L. REV. 1093, 1093 (1993) (stating that a "central goal [of tort law] is to reduce accident costs by deterring the creation of risks").
[173] Aaron Doyer, *NOTE AND COMMENT: Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J. L. & Pol'y 719, 722 (2020).
[174] *Id.*
[175] *Id.*
[176] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 216 (2019).
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Sukljian v. Ross Son Co.*, 511 N.Y.S.2d 821 (N.Y. 1986).
[185] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 217 (2019).
[186] *Id.*
[187] *Id.*
[188] *See* infra Part III.
[189] *Id. citing* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., *supra* note 1, at cmt. e
[190] 3 New York Practice Guide: Negligence § 29.03 (2021); *see, e.g.*, *Rossi v. Doka USA, Ltd.*, 121 N.Y.S.3d 41, 45-46 (1st Dep't 2020); *Gorbatov v. Matfer Group*, 136 A.D.3d 745, 26 N.Y.S.3d 92, 94 (2d Dep't 2016) (product manufacturer and anyone in chain of distribution can be sued for strict products liability regarding defectively designed product, although action was dismissed regarding "mandoline slicer").
[191] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 217 (2019) *citing* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., *supra* note 1, at cmt. g.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id. citing Kasel v. Remington Arms Co.*, 101 Cal. Rptr. 314 (Cal. Ct. App. 1972).
[198] *Id.*
[199] *Id.*
[200] *Id.* at 219-220.
[201] *Id.* at 220.
[202] *Id. citing* Aaron Task, *Americans Don't Just Shop on Amazon, They Also Admire and Trust It Too*, FORTUNE (June 7, 2016), http://fortune.com/2016/06/07/fortune-500-amazon-survey-monkey-poll/; Karsten

Strauss, *America's Most Reputable Companies, 2016: Amazon Tops the List*, FORBES (Mar. 29, 2016), https://www.forbes.com/sites/karstenstrauss/2016/03/29/americas-most-reputable-companies-2016-amazon-tops-the-list/#5e54ea83712f.
[203] *Id.*
[204] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 331 (2020); *see Escola,* 150 P.2d at 441.
[205] *Id. citing* Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 208 (2019).
[206] Sean M. Bender, *Article: Product Liability's Amazon Problem*, 4 Tex. J. L. & Tech. 95, 128 (2020).
[207] *Id.*
[208] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 331 (2020).
[209] Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENNST. L. REV. 321, 331 (2020).
[210] *Eberhart v. Amazon.com, Inc.*, 325 F.Supp. 3d 393, 396 (S.D.N.Y. 2018).
[211] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 217 (2019).
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] William L. Prosser, *The Fall of the Citadel* (Strict Lability to the Consumer), 50 MINN. L. REV. 791 (1966).
[221] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & Tech. On. 181, 229 (2019).
[222] *Id.*
[223] *Id.*
[224] *Id.* at 231.
[225] Sean M. Bender, *Article: Product Liability's Amazon Problem*, 4 Tex. J. L. & Tech. 95, 114 (2020).
[226] *Id.* at 115.
[227] *Id.*
[228] *Id.*
[229] *Id.* at 232.
[230] *Id.*

Applicant Details

First Name	**Juan**
Last Name	**Madrigal**
Citizenship Status	**U. S. Citizen**
Email Address	**Jpmg@pennlaw.upenn.edu**
Address	**Address** Street **4526 Osage Ave Apt. A-2** City **Philadelphia** State/Territory **Pennsylvania** Zip **19143** Country **United States**
Contact Phone Number	**5709060445**

Applicant Education

BA/BS From	**Pennsylvania State University-Worthington Scranton**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Pennsylvania Journal of Law and Public Affairs**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Keedy Cup**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Lee, Sophia
slee@law.upenn.edu
215-573-7790
Mayeri, Serena
smayeri@law.upenn.edu
215-898-6728
Rinaldi, Michael
michael.rinaldi@yahoo.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Juan R. Sánchez
United States District Court
Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez,

I am writing to request your consideration of my application for a clerkship beginning in fall 2024 or 2025. I am a third-year Toll Public Interest Scholar at the University of Pennsylvania Carey Law School.

As a first-generation law student and Latino immigrant, I am moved by your public interest journey to the bench.

Similarly, I am committed to a public interest career. In preparation, I have worked at Community Legal Services and the Department of Justice. I am also currently serving as the Community Editor (Tier I) for the Journal of Law and Public Affairs. Soon, I will commence work as a Research Assistant, focusing on the intersection between law, race, and today's education system. I will also be working at the Department of Labor – Office of Administrative Law Judges and the EEOC – Hearings Unit. I intend to use these experiences to further hone my research and writing skills and deepen my understanding of judicial decision-making.

As a longtime Pennsylvanian, I plan to live in Philadelphia after graduation. My four-year old son is scheduled to start kindergarten at Penn Alexander in West Philadelphia this fall.

I enclose my resume, transcripts, and writing sample. Letters of recommendation from Dean Sophia Z. Lee (slee@law.upenn.edu, 215-573-7790), Professor Serena Mayeri (smayeri@law.upenn.edu, 203-605-4926), and Duane Morris Partner and Lecturer-in-Law Michael J. Rinaldi (michael.rinaldi@yahoo.com, 610-986-8448) are also included. Please let me know if any other information would be useful. Thank you.

Sincerely,

Juan P. Madrigal Garcia

Encls.

JUAN P. MADRIGAL GARCIA

4526 Osage Ave. A-2, Philadelphia, PA 19143 | 570-906-0445 | jpmg@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA
J.D. Candidate, May 2024
Honors:

- Toll Public Interest Scholar (full, highly selective scholarship awarded based on a commitment to public service, strong academic record, and leadership potential)
- *Journal of Law and Public Affairs*, Community Editor – Tier 1 Board Position and AE

Activities: Keedy Cup Moot Court Competitor; Civil Rights Liberty Project, Senior Research Editor; LALSA, Pro Bono Chair; LALSA, 1L Mentor; Equal Justice Foundation, 3L Rep.; Penn Law Immigrant Rights Project, Volunteer; Community Legal Services Energy Clinic, Volunteer; CEIBA Voter Hotline, Volunteer; C-Rep, Volunteer.

Pennsylvania State University, State College, PA
Degree: B.S., Human Development and Family Studies | Minor in Psychology
Honors: Honors Program; Dean's List, all semesters; 2nd Place winner at the 2014 PSU-Scranton Undergrad Research Fair
Activities: Business Club; 2012 PSU Scranton Soccer
Research: 2016 Major Capstone Project: "The Pennsylvania Emerging Adult Drug Offender Intervention Program: Proposal and Trial Study"
2014 Symposium Project: "Rehabilitation Programs on Recidivism, Do They Work?"

Columbia University in the City of New York, New York, NY
Professional Graduate Certificate in Human Rights, July 2015

EXPERIENCE

EEOC – Hearings Unit, Philadelphia, PA — Upcoming Fall 2023
Law Clerk Intern – Pro Bono

Clinic Director and Professor C. McClellan, Philadelphia, PA — Upcoming Summer 2023
Legal Research Assistant

DOL – Office of Administrative Law Judges, Cherry Hill, NJ — Upcoming Summer 2023
Law Clerk Intern for Chief District Judge Theresa C. Timlin

U.S. DOJ – Civil Rights Division, Washington, D.C. — Jan. 2023 – May 2023
Legal Intern, Disability Right Section (DRS)

- Drafted legal research memos, legal research outlines, EEOC complaint reviews, and witness interview transcripts.
- Assisted as a consultant on an investigation related to ADA infractions against justice-impacted individuals.

- Conducted witness interviews, factual investigations, legal analysis, and brief revisions.
- Completed a research memo on the relationship between the ADA, the Arlington Heights framework, and municipal law.

Community Legal Services, Philadelphia, PA
Legal Intern and Peggy Browning Fellow, Employment Unit Jun. 2022 – Aug. 2022

- Drafted arbitration memos, legal research memos, demand letters, and government agency complaint forms focusing on state and federal wage theft and discrimination law.
- Conducted client interviews & counseling, factual investigations, employer negotiations, and legal analysis in *Spanish and English.*
- Completed research memos on the Fair Labor Standards Act's overtime exemptions and the effects of federal and state firearms statutes on clients' employment opportunities.

Goodwill Industries of Northeastern PA, Scranton, PA
Court Coordinator of Employment Services Oct. 2019 – Aug. 2021

- Developed and implemented a partnership program with the Lackawanna County Specialty Courts to assist court clients secure employment, education, training, and unemployment benefits.
- Wrote and reviewed grants for community employment and digital skills programs.

Director of Employment Services for Disadvantaged Populations Oct. 2018 – Oct. 2019

- Managed 5 programs, across 11 counties, to maintain compliance with government regulations, billing requirements, grant stipulations, and various accreditation entities.
- Wrote and reviewed grant writing projects alongside agency leadership and board members.
- Taught mental health and work readiness curricula to special education classes in the Scranton School District.
- Developed and maintained relationships with non-profits, schools, employers, and government entities.

At-Risk Youth Mentoring Assistant Program Manager May 2016 – May 2018

- Recruited, trained, matched, and monitored volunteer mentors and at-risk youth.
- Developed, implemented, and monitored program policies per DOJ grant specifications.

LANGUAGES AND INTERESTS

Native Spanish (born in Colombia); family movie nights, weightlifting, and listening to podcasts.

Record of: Juan P Madrigal Garcia
Penn ID: 20450547
Date of Birth: 04-JAN
Date Issued: 28-MAY-2023

U N O F F I C I A L Page: 1

The University of Pennsylvania

Level:Law

Primary Program
Program: Juris Doctor
Division : Law
Major : Law

SUBJ	NO.	COURSE TITLE	SH	GRD	R
INSTITUTION CREDIT:					
Fall 2021					
Law					
LAW	500	Civil Procedure (Wang) - Sec 3	4.00	B	
LAW	502	Contracts (Hoffman) - Sec 3	4.00	B	
LAW	504	Torts (Tani) - Sec 3B	4.00	B	
LAW	510	Legal Practice Skills (Simon)	4.00	CR	
LAW	512	Legal Practice Skills Cohort (Rauenzahn)	0.00	CR	
Ehrs: 16.00					
Spring 2022					
Law					
LAW	501	Constitutional Law (Roosevelt) - Sec 3B	4.00	B+	
LAW	503	Criminal Law (Ossei-Owusu) - Sec 3	4.00	A	
LAW	510	Legal Practice Skills (Simon)	2.00	CR	
LAW	512	Legal Practice Skills Cohort (Rauenzahn)	0.00	CR	
LAW	601	Administrative Law - 1l (Lee)	3.00	B+	
LAW	762	National Security Law (Finkelstein)	3.00	A	
Ehrs: 16.00					
Fall 2022					
Law					
********** CONTINUED ON NEXT COLUMN **********					

SUBJ	NO.	COURSE TITLE	SH	GRD	R
Institution Information continued:					
LAW	5950	Advanced Writing: Federal Litigation (Rinaldi)	2.00	A	
LAW	6310	Evidence (Ferzan)	4.00	B	
LAW	6590	Employment Discrimination (Mayeri)	3.00	A-	
LAW	8290	Journal of Law & Public Affairs - Associate Editor	0.00	CR	I
LAW	9140	Power, Injustice, and Change in America (Sutcliffe)	3.00	A	
LAW	9440	Litigation for Social Change (Trujillo)	3.00	A	
Ehrs: 15.00					
Spring 2023					
Law					
LAW	6410	Employment Law (Lee)	3.00	B+	
LAW	7020	Trial Advocacy (Thompson)	2.00	CR	
LAW	7130	Ethical Leadership for Lawyers (Wilkinson-Ryan)	1.00	CR	
LAW	8130	Appellate Advocacy Preliminary Competiton (Gowen)	1.00	CR	
LAW	8290	Journal of Law & Public Affairs - Associate Editor	1.00	CR	I
LAW	8660	Ad- Hoc Externship (Mayeri)	4.00	CR	
Ehrs: 12.00					

********** TRANSCRIPT TOTALS **********

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TOTAL INSTITUTION	59.00
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OVERALL	59.00

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UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Juan Madrigal

Dear Judge Sanchez:

Juan Madrigal Garcia is a talented, compelling, hard-working and fully-formed adult who brings enormous energy and commitment to all he does. He will be an able clerk and a delight to mentor. I recommend him to you for a clerkship with great enthusiasm.

Juan is a strong legal writer and analyst who will be well prepared for a clerkship. I taught Juan Administrative Law and Employment Law in his first and second years of law school, respectively. Juan was an engaged and productive member of both classes. He was a consistent, high-quality participant in our discussions, with insightful contributions and a pragmatic bent. He also earned my highest marks when cold called, including on the second day of Administrative Law, which can be an intimidating and challenging course for first-year students such as Juan. He wrote strong exams, earning a B+ in both classes. Across the exams, he spotted issues well and provided very good to excellent analyses of the issues, earning my top marks on several. Most recently, he did a particularly outstanding job on a factually complicated question of employee status and and a tricky hostile work environment issue. He is a strong writer as well, earning extra points for the quality of his legal writing and top marks on a persuasive essay in Employment Law.

Juan has done well academically while juggling an impressive array of extra-curricular commitments and parenting a young child. Juan returned to law school after working in social services for several years. After a semester adjusting to law school, he maintained an A- average his second and third semesters. He has accomplished this while also participating in an astonishing array of public service commitments, including leadership roles in our Latin American Law Students Association and Civil Rights Liberty Project as well as working for a host of student-run pro bono projects. Juan has also pursued a time-consuming externship this spring with the DOJ's Civil Rights Division. He manages all these commitments while also parenting his four-year old son. Juan is an able multi-tasker who will successfully manage the demands of a clerkship.

Juan is committed to public service and will bring that ethos to a clerkship. Juan received our most competitive public interest fellowship, one we reserve for applicants with great promise academically and in the realm of public service. Juan has lived up to that promise, undertaking pro bono work on issues ranging from civil and voting rights to immigration. He has also pursued an array of government externships, spanning the DOJ, the Department of Labor, and the EEOC. Juan will bring his impressive energy and commitment to a clerkship.

Juan will fit in well in chambers and be a rewarding mentee. Juan has an irrepressible warmth and infectiously upbeat personality. He was raised by a single mother in Colombia, moving around quite a bit for her job. When he was 8, she married his stepfather and they settled in a Pennsylvania community where immigrants from Latin America were rare. The same perseverance and positive attitude that led Juan to quickly master English, excel academically, and build a strong community after his arrival in the United States will ensure he integrates well into any chambers. His mixture of grit and good humor will make him a pleasure to mentor.

Talented, committed, compelling, and personable, Juan will make an excellent clerk and rewarding mentee. A fully-formed adult accustomed to juggling well a myriad of responsibilities, he will master easily the challenges of a demanding clerkship. I recommend him to you with great enthusiasm.

Sincerely,

Sophia Z. Lee
Professor of Law
Tel.: (215) 573-7790
E-mail: slee@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Juan Madrigal

Dear Judge Sanchez:

It is with great pleasure and enthusiasm that I write to recommend Juan P. Madrigal for a clerkship in your chambers. Mr. Madrigal's intellect, work ethic, interpersonal skills, and professionalism all promise to make him an excellent law clerk. The recipient of a highly selective Toll Public Interest Scholarship, a full-tuition award for exceptionally promising students, Mr. Madrigal is deeply committed to a career in public service.

Born in Colombia, Mr. Madrigal immigrated to the United States with his mother at age 8, and grew up in the Poconos, where he quickly learned English and excelled in school. He graduated from the Honors program at Penn State with a degree in Human Development and Family Studies and earned a graduate certificate in human rights from Columbia University. Mr. Madrigal then spent several years working for Goodwill Industries in Scranton, first as assistant manager of a mentoring program for at-risk youth, and then in two different positions related to employment services, including one in which he partnered with county specialty courts to assist clients in obtaining employment, education and training, and government benefits. His experiences at Goodwill working with low-income clients, many of whom confronted challenges related to criminal system involvement and disability as well as poverty, confirmed Mr. Madrigal's interest in attending law school so that he could advocate for communities in need.

I first came to know Mr. Madrigal when he enrolled in my Employment Discrimination course in the Fall of 2022. From the first day of class, Mr. Madrigal was an active, thoughtful, and eloquent participant in our discussions, matching an intuitive grasp of the material with hard work and impeccable preparation. I could always count on Mr. Madrigal to offer a well-timed, insightful intervention, informed in equal measure by serious study of the class material and real-world work experience.

Grades in the course were based primarily on an 8-hour takeaway exam. The first part of the exam consisted of an issue-spotter that required students to identify potential legal claims, apply
the law to an intricate fact pattern, and make compliance recommendations to a hypothetical employer. The second part was a more open-ended essay question that asked students to make descriptive and normative judgments about the field of employment discrimination law. Mr. Madrigal's answers were clearly written and organized, and demonstrated his grasp of both doctrinal details and broader policy questions. Together with his excellent class participation, his exam earned Juan an A-minus in the course.

I was delighted when Mr. Madrigal asked me to be his faculty supervisor for a term-time externship in the Disability Rights Section of the U.S. Department of Justice Civil Rights Division in the Spring of 2023. He had wonderful experience there, full of opportunities to develop his research and writing skills, to be mentored by accomplished attorneys, and to better understand the workings of federal civil rights enforcement. Though the specifics were confidential, he was able to share in general terms his work on an in-depth research project involving the Arlington Heights factors for determining whether defendants acted with discriminatory intent; he also reviewed EEOC files and assisted with ongoing investigations, among other projects.

Mr. Madrigal received glowing reviews from his on-site supervisors at the DOJ. I quote from his final evaluation with their permission. His supervisors "consistently praised his professionalism, clear communication skills, thoroughness, diligence, and maturity," as well as his "passion and enthusiasm" and "commitment to civil rights work." They lauded his "industriousness, persistence, and ability to grapple with very challenging legal issues"; his "impressive ability to think creatively and analytically" and to remain "undaunted even when presented with questions where existing law and facts did not always provide a clear answer"; his "strong oral presentation skills"; and his "perseverance and professionalism when working under stressful circumstances." They noted with respect to a time-sensitive project that Juan "was able to locate relevant materials that the attorneys had not and exhausted all available resources to track down some elusive leads successfully." Mr. Madrigal "went above and beyond by doing additional legal and medical research to deepen understanding of the issues" and his "energy and positive outlook" made it "a true pleasure to work with Juan." Mr. Madrigal received the highest rating, "outstanding," for his overall externship performance.

In addition to his coursework and externships, Mr. Madrigal has sought out every chance to learn more about legal practice in the areas about which he is passionate. A Peggy Browning Fellowship funded his 1L summer internship at Community Legal Services in Philadelphia, where his work focused on state and federal wage theft, anti-discrimination laws, the Fair Labor Standards Act, and the impact of criminal laws on employment opportunity. The internship gave him valuable experience drafting research memos, demand letters, and complaints, as well as conducting client interviews and counseling in both English and Spanish. He will spend his 2L summer interning at a DOL Office of Administrative Law Judges and conducting research on antidiscrimination law's intersection with education—including school discipline policies, hostile environment claims, and affirmative action—for Professor Cara McClellan, head of Penn Carey Law's new Advocacy for Racial and Civil Justice Clinic.

Serena Mayeri - smayeri@law.upenn.edu - 215-898-6728

Mr. Madrigal has also taken on leadership roles in the Penn Law community. He is pro bono chair of the Latin American Law Students' Association (LALSA), and he serves as a 1L mentor. He pursued pro bono work with the Immigrant Rights Project and the Civil Rights Liberty Project, taking on a position as Senior Research Editor reviewing and editing research by student volunteers on caselaw developments in antidiscrimination law and due process in the Third Circuit and the District of Delaware for the ACLU of Delaware. He has also secured a term-time internship for the fall in the EEOC hearings unit in Philadelphia. He will serve as 3L representative on the Board of the Equal Justice Foundation and has a position of considerable responsibility on the Journal of Law and Public Affairs.

Finally, I would be remiss if I did not note Juan's wonderful interpersonal acumen: he is kind, thoughtful, and mature, with a knack for putting others at ease and bringing out the best in those with whom he works and learns. In short, Juan Madrigal's application for a judicial clerkship has my strong and enthusiastic endorsement.

Thank you very much for your consideration. I would be delighted to speak with you about Juan's application should that prove helpful at any point, and hope you will not hesitate to contact me if there is any further information or assistance I can provide.

Sincerely,

Serena Mayeri
Professor of Law and History
Tel.: (215) 898-6728
E-mail: smayeri@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Juan Madrigal

Dear Judge Sanchez:

I write to offer my strong recommendation of Juan P. Madrigal for a clerkship in Your Honor's chambers. I had the privilege of teaching Mr. Madrigal during the fall semester of 2022 at the University of Pennsylvania Carey Law School, in an upper-level course entitled "Advanced Writing: Federal Litigation."

The course has exacting requirements. During the semester, students must submit five written assignments, representing various stages of litigation in federal district court. The course begins with pre-complaint investigative steps and concludes with post-trial filings. Assignments are drawn from actual cases from around the country, and students are required to comply with applicable local rules and judges' procedures. Students are expected to develop cogent, well-reasoned arguments that fairly reflect the facts, the law, and their opponents' arguments.

Mr. Madrigal stands out among all of my students for his commitment to public service. He is a Toll Public Interest Scholar at the University of Pennsylvania Carey Law School, and he already has to his credit numerous pro bono achievements. He is strongly committed to government service—and not merely as a "check the box" exercise, before pursuing the "next thing." It is clearly where his passions lie. From reviewing his written work product and observing him in and out of class, I can say that he possesses the intellect, character, and judgment necessary for a successful career in public service. Put simply, the United States of America will be well represented by Mr. Madrigal.

Mr. Madrigal's work in the course was very good, and for it he earned an "A." I was impressed by Mr. Madrigal's ability to improve on first drafts, and to improve throughout the course of the semester. Mr. Madrigal does not "coast." He is hard working, diligent, and responds well to criticism. His questions about the course material were well thought out and demonstrated that he spent considerable time considering the issues.

Mr. Madrigal also demonstrated a good working knowledge of the rules. Much of the course involved preparing documents in compliance with the Federal Rules of Civil Procedure, local rules, and judges' procedures. Mr. Madrigal was a quick study and consistently submitted written work product, which was both persuasive and in conformity with these rules. Mr. Madrigal is clearly a law student who is ready for law practice.

Finally, Mr. Madrigal's personality draws people together, as opposing to driving them apart. He is kind and has a smile that lights up a room. He does not take himself too seriously. So much of legal practice concerns difficult situations and tough issues. The legal profession needs fewer difficult personalities. Mr. Madrigal's character and personality would enhance our profession. He has an approach that leads me to believe that he will more often "dial down the temperature" than cause conflict for the sake of conflict. He possesses a strong ability to listen to others' points of view and to react appropriately. Attorneys for the government possess considerable power in our system, and it makes me feel good that that power may one day be exercised by a person with such judgment, temperament, and character.

Mr. Madrigal displays attributes that are needed in the profession, and particularly for government service. A clerkship would benefit him—and ultimately the public he will serve—by exposing him to the process of judicial decision making, as well as giving him further opportunities to develop his already strong legal research and writing skills. For all of these reasons, I strongly recommend Mr. Madrigal for a law clerk position in Your Honor's chambers.

Respectfully,

Michael J. Rinaldi,
Lecturer in Law
mjrinaldi@duanemorris.com
215-979-1126

Juan P. Madrigal Garcia (ID #-----)
(570) 906-0445
3501 Sansom St
Philadelphia, PA

Attorney for Brandon Gulley

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

Plaintiff **BRANDON GULLEY** vs. **MATT WEBB, JASON MURPHY, BOBBY THORPE, JOHN DOE 1, AND HAMBLEN COUNTY** Defendants	**Case No**. 2:10-CV-100

MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Defendants' Motion for Summary Judgment should fail because it misapplies the rule in Heck, genuine issues of material fact exist, and cites case law that is legally and factually distinct from this case. In Hamblen County Jail, Defendants rendered Gulley unconscious after he assaulted them. They placed him in restraints while he was unconscious and completed their arrest. Then, they tased Gulley to bring him back to consciousness, jumped on his rib cage, and continued to torture him with the taser. Defendant Webb then slammed Gulley into a cage door and forced his head into a toilet. They continued to beat him until he again lost consciousness. He was tased back to cognizance and subsequently beaten at least two more times.

Following these beatings, Gulley was escorted from his cell to a vehicle for transport to the hospital. On the way to the transport, Defendant Webb slammed Gulley's head into a wall for apparently failing to answer a question. Gulley was placed in the vehicle then Defendant Webb punched Gulley in the head and said, "one for the road, b****." Bloodstained Gulley was returned from the hospital and not permitted to wash himself. Gulley later pled guilty to two counts of assault.

In short, Defendants restrained and completed Gulley's arrest shortly after he assaulted them. *Then*, they used excessive force against him via physical and psychological torture. Defendants attempt to conflate these sequential yet *distinct* events to misuse the "favorable termination rule." Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). Yet § 1983 excessive force claims are generally not barred by Heck

based on more recent decisions. The holdings in those decisions seem cognizant of criminals' susceptibility to abuse by law enforcement. If Heck barred all § 1983 claims stemming from an underlying assault conviction, law enforcement officers would be able to abuse their control over arrestees with impunity. Retaliation by prison guards would rise and inmates, like Gulley, would not be able to hold guards accountable for cruel and unusual punishment. Thus, Defendants' Motion for Summary Judgment should be denied.

STATEMENT OF MATERIAL FACTS

I. INITIAL ALTERCATION BETWEEN GULLEY AND DEFENDANTS.

In Hamblen County Jail on May 12, 2009, Plaintiff Gulley used a mop handle to assault two of the Defendants, correctional officers Matt Webb and Jason Murphy. (Gull. Decl. 1:3-4, attached as Ex. 1). (Certified Copy of the Judgment in Case Number 149337, "Webb Report 1," attached as Ex. 2). Defendants Matt Webb, Jason Murphy, Bobby Thorpe, and John Doe I rendered Gulley unconscious during the arrest and placed him in restraints. (Gull. Decl. 1:4). Unconscious and fully under arrest, Gulley offered no further resistance. Id.

On May 13, 2009, Gulley pled guilty to assault charges: assault on an officer, (Webb Report 1); and assault on an officer and attempted escape, (Certified copy of the Judgment in case number 149338, "Webb Report 2," attached as Ex. 3). During the proceeding, Gulley did not challenge Defendant Webb's report which described the incident up until the point of arrest.

II. POST-RESTRAINT EXCESSIVE FORCE.

The basis for this civil case stems from Defendants' post-arrest excessive force. Defendants proceeded to tase Gulley back to consciousness after he was already unconscious, restrained, and fully under arrest. (Gull Decl. 1:4). One of the Defendants jumped on Gulley's rib cage while the other correctional officers continued to torture him with the taser. Id. at 1:5. Defendant Webb slammed Gulley into the cage door and then put his head in a toilet. Id. They beat Gulley until his consciousness drifted again. Id. Using the taser, they forced Gulley back to consciousness and continued to beat him. This sequence of events occurred at least two times. Id. at 2:6.

The Defendants then escorted Gulley to the hospital transport. Id. at 2:7. On the way, Defendant Webb slammed Gulley's head into a wall because he allegedly failed to answer a question. Id. Gulley was placed in the vehicle and then was punched in the head by Defendant Webb who said, "one for the road, b****." Id. at 2:8. Upon Gulley's return to the jail from the hospital, he was not allowed to clean the blood off himself. Id. at 2:9.

SUMMARY JUDGMENT STANDARD

Summary Judgment requires that there is no genuine dispute of any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The substantive law controls which facts are material and a fact is material only if it might affect the outcome of the lawsuit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party's evidence must be believed, and the court should draw all justifiable inferences in

his favor. Tolan v. Cotton, 572 U.S. 650, 651 (2014) (citing Anderson, 477 U.S. at 255). Moreover, all underlying facts are viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

ARGUMENT

Defendants' Motion for Summary Judgment should fail because they misuse Heck, a genuine issue of material fact exists, and their argument relies on case law legally and factually distinct from this case.

I. DEFENDANTS FAIL TO PROVIDE THE ENTIRETY OF THE HOLDING IN HECK.

Defendants mistakenly assert that this court must apply the favorable termination rule to this case based on Heck.

In Heck, prosecutors charged Heck with voluntary manslaughter. 512 U.S. at 477. While incarcerated, he filed a § 1983 action for damages against prosecutors and a state police investigator, accusing them of engaging in unlawful acts akin to malicious prosecution. Id. at 477, 484. The Court reasoned that if the plaintiff's § 1983 claim for malicious prosecution was successful, then the underlying conviction would be rendered invalid – noting that civil tort actions are inappropriate vehicles for challenging convictions. Id. at 486-87. Thus, the Court held that the plaintiff needed to show that the alleged malicious prosecution action ended in his favor or that the "conviction or sentence [was] reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of

habeas corpus." Id. Collectively, this is now known as the "favorable termination rule." Id. at 492.

Here, the Defendants' Motion focuses on this narrow provision of Heck and fails to provide the entirety of the holding. The Supreme Court also explained that a district court needed to consider whether "judgment in favor of the plaintiff would *necessarily imply* the invalidity of his conviction or sentence" when applying the "favorable termination rule." Id. at 487 (emphasis added). The claim should proceed if the plaintiff's claim, even if successful, would not invalidate the underlying conviction. Id. Thus, this court is *not bound* to dismiss Gulley's claim.

II. GULLEY'S § 1983 WOULD NOT INVALIDATE HIS ASSAULT CONVICTION.

In addition, Defendants rely on Heck despite the noticeable legal and factual differences between it and the case at hand. These differences establish that Gulley's claim, if successful, would not necessarily invalidate his underlying conviction for assault.

In Heck, an element of the plaintiff's malicious prosecution claim was showing "the termination of the prior criminal proceeding in favor of the accused." Id. at 484. This means that the plaintiff's § 1983 claim necessarily implied the invalidity of his past conviction. Id. at 491. In contrast, Gulley's excessive force claim under the Eighth Amendment does not have an element requiring the termination of the prior criminal proceeding. See Pelfrey v. Chambers, 43 F.3d 1034, 1037 (6th Cir. 1995) (explaining that "unnecessary and wanton infliction of pain" are the elements of an excessive force claim under the Eighth Amendment).

Thus, the excessive force claim does not necessarily imply the invalidity of his past convictions for assault.

Further, Gulley's excessive force claim does not necessarily imply the invalidity of his assault conviction because the Defendants' injurious conduct did not cause his assault conviction. In contrast, the injurious conduct in Heck was inextricably tied to the plaintiff's conviction because the prosecutors' alleged misconduct caused the conviction.

Building on this, Gulley's claim, if successful, would not necessarily invalidate his assault conviction because it is based on the guards' conduct *after* his arrest, not the events that caused his arrest. Defendant Webb's report states that Gulley was rendered unconscious and then handcuffed, completing the arrest. (Webb Report 1). Although not found in Webb's report, Gulley was then brutally beaten and degraded via the Defendants' *post-arrest* conduct. (Gull Decl. 1:4). Thus, Gulley's claim that excessive force was used *post-arrest*, if successful, would not necessarily invalidate his conviction for *pre-arrest* assault against the guards, weakening the applicability of Heck.

III. MUHAMMAD ALLOWS § 1983 CLAIMS FOR COMPENSATORY AND PUNITIVE DAMAGES.

Next, Defendants' Motion for Summary Judgment should be denied because more recent Supreme Court precedent shows that Heck does not outright ban § 1983 claims for monetary damages.

The Supreme Court clarified that Heck does not bar § 1983 claims at Summary Judgment when the plaintiff seeks only monetary damages. Muhammad

v. Close, 540 U.S. 749, 754 (2004). In Muhammad, the plaintiff filed a § 1983 claim after he was subjected to threatening and retaliatory behavior by a prison guard, which caused the plaintiff to incur a misconduct charge. Id. at 752-53. The plaintiff's § 1983 action sought only compensatory and punitive damages "for the physical, mental, and emotional injuries sustained." Id. at 753. The defendant's Motion for Summary Judgment succeeded at the magistrate, trial, and appellate levels, with the Sixth Circuit affirming the Motion under Heck because it reasoned that the plaintiff sought to expunge the misconduct charge from his record via his § 1983 action. Id. at 753-54. Yet the Supreme Court reversed the Sixth Circuit, holding it erred as a matter of fact and law because the plaintiff expressly asked for only damages, not an expungement of his record. Id. at 754.

Here, like in Muhammad, the Defendants' Motion should be denied because Gulley is not asking to expunge or overturn his assault convictions. Like the plaintiff in Muhammad who expressly asked for only compensatory and punitive damages, Gulley is expressly asking for *only* compensatory and punitive damages for his physical and psychological injuries.

IV. GENUINE ISSUES OF MATERIAL FACT EXIST.

Defendants' Motion should fail because the degree of excessive forced used creates genuine issues of material fact.

In Nelson v. Sharp, the Sixth Circuit denied a prison guard's Motion for Summary Judgment due to the existence of a genuine issue of material fact. 182 F.3d 918, 919 (6th Cir. 1999). The plaintiff filed a § 1983 excessive force claim

alleging that a guard purposely shut a food slot on his hand after he failed to comply with an order. Id. The plaintiff received a disciplinary conviction for the incident. Id. The defendant used Heck in their Motion, claiming that the plaintiff's claim would improperly imply the invalidation of his conviction. Id. The Sixth Circuit rejected the defendant's argument because the "question of degree of force used" is analytically distinct from whether the plaintiff violated prison rules, creating a genuine issue of material fact. Id.

Likewise here, genuine issues of material fact exist. Whether the Defendants' use of force immediately after arresting Gulley was excessive is analytically distinct from Gulley's assault on the guards. Also, like the plaintiff in Nelson whose hand was crushed due to a failure to respond to the guard, Gulley's head was slammed by the defendant for an alleged failure to respond to the Defendant's question, creating an additional instance of excessive force and, thus, another genuine issue of material fact.

V. DEFENDANTS' MOTION MISTAKENLY RELIES ON CASE LAW FOCUSING ON PRE-ARREST § 1983 CLAIMS OUTSIDE OF THE PRISON CONTEXT.

Lastly, Defendants' fail to support their Motion with case law that is factually and legally analogous to this case. The case law cited by Defendants occurs outside of the prison context and concerns § 1983 claims that challenge the validity of the underlying conviction by focusing on *pre-arrest* conduct. Whereas this case deals with the prison context and does not challenge the validity of the underlying conviction because it focuses on *post-arrest* conduct.

Defendants misapply Schilling v. White, 58 F.3d 1081, 1083 (6th Cir. 1995), to show that Heck bars a § 1983 plaintiff from seeking only monetary damages. Schilling involves a § 1983 claim related to an allegedly unconstitutional car search that *caused* a DUI conviction. Id. The Sixth Circuit in Schilling barred the claim under Heck because the plaintiff's claim, if successful, would have invalidated the DUI conviction. Id. at 1086.

Schilling is not applicable to this case. Unlike in Schilling where the alleged unconstitutional *pre-arrest* search caused a conviction, the alleged injurious conduct in this case occurred *post-arrest* and did not cause Gulley's assault convictions. These temporal differences make Schilling inapplicable because the allegations in this case, if successful, would *not* necessarily invalidate Gulley's assault convictions.

Then, Defendants attempt to use Brown v. City of Detroit, 47 Fed. Appx. 339, 2002 WL 31114766 (6th Cir. 2002), to demonstrate Heck barring a § 1983 claim for excessive force. In Brown, the plaintiff was pursued for committing first degree murder and, prior to the arrest, was shot by one of the officers, then arrested, and subsequently also charged with intent to murder the officer during the arrest. Id. at *1. The court denied the plaintiff's claim based on Heck because his excessive force claim, if successful, would have invalidated his conviction for intent to murder an officer. Id. at *2.

Defendants' use of Brown is inappropriate for the same reason Schilling fails. The claim in Brown, if successful, would have invalidated the plaintiff's intent to murder conviction because the alleged injurious conduct occurred *pre-arrest*. But

Gulley's claim, if successful, would not invalidate his assault convictions because the injurious conduct occurred *post-arrest* through a series of brutal beatings.

Finally, Defendants use Ruiz v. Martin, 72 Fed. Appx. 271, 275 (6th Cir. 2003), to claim that Heck bars § 1983 claims where the plaintiff's underlying conviction is for assault. The plaintiff in Ruiz brought a § 1983 claim that he was falsely arrested, and that excessive force was used. Id. at 272. The arrest led to assault convictions. Id. He denied assaulting the guards, doing anything to warrant force, claimed that the guards falsified their reports, and that any actions on his part were self-defense. Id. at 274. The plaintiff sought dismissal and expungement of the convictions. Id.

The Ruiz court affirmed the defendants' Motion for Summary Judgment for various reasons. Id. First, existing precedent held that Heck barred excessive force claims if the plaintiff claims the guards falsified their report. Id. (citing Huey v. Stine, 230 F.3d 226, 231 (6th Cir. 2000)). Second, the court outright barred the claim under Heck because if the plaintiff's claim were successful then the underlying conviction for assault would be invalid. Id. at 275.

Here, Ruiz does not support Defendants' Motion. First, unlike the plaintiff in Ruiz, Gulley never claimed that the Defendants falsified their report. Second, the alleged injurious conduct in Ruiz occurred *while* the guards arrested the plaintiff, whereas the injurious conduct in this case occurred *post-arrest*. Thus, unlike in Ruiz, Gulley's claim would not invalidate his assault conviction. Lastly, the Ruiz plaintiff expressly sought dismissal and expungement of his convictions. In

contrast, Gulley expressly seeks only monetary damages. Per Muhammad, 540 U.S. at 754, there is no Heck restriction when a § 1983 excessive force claim seeks only monetary damages.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied.

DATED: November 21, 2022

Greeneville, Tennessee

Respectfully submitted:

/S/ Juan P. Madrigal

Juan P. Madrigal (ID #-----)

Penn Law

Philadelphia, PA

Attorney for Brandon Gulley

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing Memorandum of Law in Opposition of the Motion for Summary Judgment of Defendants, Matt Webb, Jason Murphy, Bobby Thorpe, John Doe 1, and Hamblen County was served this day via certified mail and electronically to counsel for Defendants at the following address:

Jeffrey R. Thompson

Attorney for Hamblen County, Tennessee

416 SW Cumberland Avenue

Knoxville, TN 37901

/s/ Juan P. Madrigal

Juan P. Madrigal

Date: November 21, 2022

Applicant Details

First Name	**Stephen**
Last Name	**Mageras**
Citizenship Status	**U. S. Citizen**
Email Address	**stephen.mageras@gmail.com**
Address	**Address** Street **548 Driggs Avenue #4** City **Brooklyn** State/Territory **New York** Zip **11211** Country **United States**
Contact Phone Number	**2039790982**

Applicant Education

BA/BS From	**Harvard University**
Date of BA/BS	**May 2017**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Annual Survey of American Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Farahani, Shireen
shireen.farahani@law.njoag.gov
Wyman, Katrina
katrina.wyman@nyu.edu
212-998-6033
Heydari, Farhang
fh2213@columbia.edu
212-998-6469

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Stephen Mageras
548 Driggs Avenue #4
Brooklyn, NY 11211

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I am a rising third-year student at New York University School of Law and Managing Editor for Development of the New York University Annual Survey of American Law. I am writing to apply for a 2024-2025 term clerkship in your chambers. I am particularly interested in clerking for you in the Eastern District of Pennsylvania because it will bring me closer to my parents, who recently moved to New Hope in Bucks County. Additionally, as someone who aspires to become a federal prosecutor, I am eager to learn from a judge who has a background as a public defender. I believe your firsthand experience advocating for defendants' rights will provide invaluable insights into the criminal justice system and enhance my understanding of the complexities involved in prosecuting cases effectively and ethically.

Enclosed please find my resume, law school transcript, and two writing samples. Also enclosed are letters of recommendation from Professor Katrina Wyman, Professor Farhang Heydari, and Ms. Shireen Farahani. I served as a research assistant for Professors Wyman and Heydari, and Ms. Farahani supervised my work at the New Jersey Attorney General's Office.

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Stephen Mageras

STEPHEN MAGERAS

548 Driggs Avenue #4
Brooklyn, NY 11211
(203) 979-0982
stephen.mageras@gmail.com

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Honors: *Annual Survey of American Law*, Managing Editor for Development
Activities: Curriculum and Adjunct Appointments Committee, Student Representative
Rights Over Technology, Member
Professor Barry Friedman, Teaching Assistant (Fall 2023)
U.S. Attorney's Office for the Southern District of New York, Externship (Spring 2024)

HARVARD UNIVERSITY, Cambridge, MA
B.A. in Environmental Science & Public Policy, Secondary in Economics, May 2017
Capstone Project: Explored using machine learning methods to classify Twitter accounts as either climate change believers or deniers on the basis of their Tweets.
Activities: Varsity Fencing Team, Captain and Athlete (NCAA All-American; Ivy League Champion)
Institute of Politics, Researcher and Policy Writer

EXPERIENCE

ARNOLD & PORTER KAYE SCHOLER LLP, New York, NY
Summer Associate, May 2023 - Present

PROFESSOR KATRINA WYMAN, NYU SCHOOL OF LAW, New York, NY
Research Assistant, January 2023 - April 2023
Researched and prepared memorandums on property law doctrines. Topics included public accommodations law, the doctrine of ouster, and regulatory takings.

NEW JERSEY ATTORNEY GENERAL'S OFFICE, Newark, NJ
Summer Intern, Division of Law, June 2022 - August 2022
Conducted extensive legal research and writing for the Affirmative Civil Rights and Labor Enforcement group. Drafted memorandum on federal preemption of state labor laws.

PROFESSOR FARHANG HEYDARI, NYU SCHOOL OF LAW, New York, NY
Research Assistant, June 2022 - August 2022
Researched the constitutional implications of private surveillance. Drafted memorandum on the First Amendment right to gather information.

GOLDMAN SACHS, New York, NY
Compliance Technology Office Associate, January 2021 - August 2021; ***Analyst,*** July 2017 - January 2021
Guided project delivery and developed policies and governance for the engineering team within Goldman's Compliance Division. Designed and managed new policies and control standards for a data analytics platform used by compliance personnel to create high-risk workflows.

ADDITIONAL INFORMATION

Experience volunteer canvassing for political campaigns. Hobbies include acoustic guitar, watch collecting, and running.

Name: **Stephen Mageras**
Print Date: **06/01/2023**
Student ID: **N14689673**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Juan P Caballero			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Rachel E Barkow			
Torts	LAW-LW 11275	4.0	B
Instructor: Christopher Jon Sprigman			
Procedure	LAW-LW 11650	5.0	B
Instructor: Samuel Issacharoff			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 10427	4.0	A-
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Juan P Caballero			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Emma M Kaufman			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Liam B Murphy			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Andrew Weissmann			
Law and Society in China Seminar	LAW-LW 10871	2.0	A
Instructor: Ira Belkin, Katherine A Wilhelm			
Legislation and Political Theory	LAW-LW 11688	3.0	A-
Instructor: John A Ferejohn			
Income Taxation	LAW-LW 11994	4.0	B+
Instructor: Eric Zolt			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	B+
Instructor: Marcel Kahan			
Evidence	LAW-LW 11607	4.0	B+
Instructor: Daniel J Capra			
Judicial Decision Making	LAW-LW 12250	4.0	A
Instructor: Barry E Friedman			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Katrina M Wyman			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	57.0	57.0

Staff Editor - Annual Survey of American Law 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

State of New Jersey

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box
TRENTON, NJ 08625-0

MATTHEW J. PLATKIN
Attorney General

MICHAEL T.G. LONG
Director

May 19, 2023

Your Honor:

I write to support Stephen Mageras's application as a judicial law clerk. I supervised Stephen's work on a substantial research memorandum when he interned with our Affirmative Civil Rights & Labor Enforcement section, which investigates civil rights, labor and workplace violations in New Jersey and brings appropriate actions to combat those violations.

Throughout his time with our office, I was impressed by Stephen's excellent legal research and writing skills, particularly his ability to clearly and succinctly summarize complicated legal standards. The matter on which I worked with him likewise had a lengthy procedural history; Stephen deftly distilled a years-long litigation history into a few sentences. As a testament to the strength of his legal writing, he produced a well-reasoned and easy-to-follow memo for a matter that involved myriad substantive and procedural issues. When a new attorney joined that matter after Stephen's internship concluded, his memo ultimately served as a resource to provide further background on the case.

Stephen also took direction well. He asked thoughtful questions to help guide his writing and not only readily incorporated feedback on his written work, but also took that feedback into consideration in his subsequent work product. I appreciated Stephen's diligence in cite-checking and making sure that each proposition, as well assertions about the background and timeline of the case, found adequate support in case law, statutes, and the record.

Stephen demonstrated enthusiasm in taking on challenging legal issues, produced thoroughly researched and reliable work product, and maintained cooperative relationships with deputies in the section, who were similarly impressed by his work for our office. One attorney noted: "Stephen is an excellent writer. He did good job of condensing and summarizing large amounts of case law." Another attorney noted: "Stephen was quick to raise his hand to take on assignments. He produced high-level research and spotted a related connected issue that was not on the team's radar."

HUGHES JUSTICE COMPLEX • TELEPHONE: (609) 826-6763 • EMAIL: shireen.farahani@law.njoag.gov

I echo this great feedback and wholeheartedly recommend Stephen's candidacy as a judicial law clerk.

Sincerely,

Shireen Farahani
Deputy Attorney General
New Jersey Division of Law

New York University
A private university in the public service

School of Law

40 Washington Square South, Room 314F
New York, NY 10012-1099
Telephone: (212) 998-6033
Facsimile: (212) 995-4341
E-mail: katrina.wyman@nyu.edu

Katrina M. Wyman
Wilf Family Professor of Property Law
Director, Environmental and Energy Law LLM Program

«DateForLetter»

RE: «Student»

Your Honor:

I write to recommend Stephen Mageras for a clerkship.

Stephen earned an A- in my 1L Property class in the spring of 2022, based on the examination. Stephen worked for me in the spring of 2023 as a research assistant, researching and writing several memos on property law topics.

Before law school, Stephen graduated from Harvard University with a B.A. in Environmental Science & Public Policy, and a Secondary in Economics. For four years, he was an analyst and then an associate in the Compliance Division at Goldman Sachs in New York.

In addition to his course work at the law school, Stephen is involved with the Annual Survey of American Law, a student-edited journal. He was a staff editor as a 2L and is currently the Managing Editor for Development, a position for which he was selected by the Journal's board. In this role, Stephen reads and evaluates submissions to the Journal, and leads a team of editors in providing authors with feedback on their work. Stephen's extra-curricular activities also include being a student member of the Curriculum and Adjunct Appointments Faculty Committee. This is an important committee at the law school that vets the creation of new classes and the appointments of adjunct professors.

Based on the memos that Stephen did for me this spring, I can attest that he has excellent research and writing skills. The topics he researched included various legal issues about concurrent forms of ownership, such as joint tenancy and tenancy in common. For example, Stephen researched the concept of "ouster," attempting to distill from existing treatises and case law whether it is a cause of action, an element of a cause of action or something else. Stephen found that different sources assign different roles to ouster, jurisdictions likely vary in the role that they envisage for ouster, and that ouster generally plays a subtle role in property law. I was grateful for his attention to detail in his research for me, and the way that he dug into case law and secondary sources in an effort to help me better understand the topic of ouster. He took on the projects as his own, and pursued avenues of research beyond what I was expecting. Stephen and I spoke about his research, and I could tell that he enjoys thinking about unresolved issues in law, and contemplating the

legal implications of different ways of addressing these issues. Stephen also presented his work in a polished form and was responsive to questions and desirous of feedback, likely reflecting his pre-law school professional experience in the demanding environment of Goldman Sachs.

In sum, I urge you to consider Stephen for a clerkship. He wants to be a federal prosecutor, and is thinking that he will begin his career in practice with a private law firm and then transition to public service. Please let me know if I can be of help in the clerkship selection process.

Sincerely,

Katrina M. Wyman

NYU | LAW

FARHANG HEYDARI
Legal Director, Policing Project at NYU School of Law
Assistant Professor, Vanderbilt Law School, effective August 2023

NYU School of Law
110 West Third Street, Room M102
New York, NY 10012
P: 917 912 0596
farhang.heydari@nyu.edu

June 12, 2023

RE: Stephen Mageras, NYU Law '24

Your Honor:

I write this letter in strong support of Stephen Mageras' application to serve as your law clerk. During the time that I have known him, Stephen has demonstrated the ability to understand and integrate a substantial body of doctrine, to work well under deadlines, and to produce succinct and high quality work product. His analytical mind, strong research skills, maturity, and equanimity will be valued assets in chambers.

In Fall 2021, Stephen was one of twelve students enrolled in a voluntary reading group on policing technologies co-taught by myself and Professor Barry Friedman. The reading group exposed students to emerging issues around police use of advanced technologies, and encouraged them to engage with the complicated costs and benefits of these technologies. Relying on a wide range of source materials, students were asked to consider different governance approaches—Fourth Amendment litigation, federal- and state-level legislation, private self-governance, and more.

Among a group of talented students, Stephen was one of our best. Over the course of the semester, he was consistently prepared and brought a mature, nuanced perspective to the discussions. He displayed not only an interest in the subject matter, but a thoughtfulness and aptitude for the lawyering skills required. He meaningfully contributed to class discussions. His maturity was due, at least in part, to his pre-law school experience—he spent years working in the compliance division of Goldman Sachs, where he was promoted at the first opportunity.

The following summer, Stephen served as my research assistant. Although he was already working full time, Stephen was eager to gain more experience with legal research and writing. Knowing the quality of his work, I was eager for the help. I tasked Stephen with a complicated research task—the constitutional dimensions of private surveillance. There was no hornbook for Stephen to turn to for most of this work. He was required to understand both the technologies at play, as well as new bodies of constitutional doctrine (e.g., First Amendment). His work was consistently excellent. I have no question that he has the research skills of an excellent law clerk.

During law school, Stephen has demonstrated a strong commitment to service, while also to developing a breadth of experience. While at NYU, he has worked with the New Jersey

Attorney General, the law school’s Curriculum and Adjunct Appointments Faculty Committee, and the *Annual Survey of American Law* (a journal that focuses on publishing practitioner perspectives—not limited to one subject area). After clerking, he hopes to work as a federal prosecutor.

In short, I am confident that Stephen will be an excellent law clerk and will benefit tremendously from the experience. In addition to his legal skills and outstanding work ethic, Stephen is a pleasure to work with. He will make a wonderful addition to any chambers.

If you have any questions or concerns, please do not hesitate to reach out to me at 917.912.0596.

Sincerely,

Farhang Heydari

Farhang Heydari

STEPHEN MAGERAS
548 Driggs Avenue #4
Brooklyn, NY 11211
(203) 979-0982
stephen.mageras@gmail.com

Writing Sample #1

The sample below is a memorandum I drafted last summer as an intern for the Affirmative Civil Rights and Labor Enforcement group at the New Jersey Attorney General's Office. It was prepared to inform a motion in a pending administrative proceeding. The central question addressed is whether New Jersey's worker classification statute is preempted by the FAAAA. Our adversary argued that the statute is preempted. They hoped to evade a state audit finding that they had been misclassifying their workers as independent contractors (rather than employees) for several years. If the finding stood, they would owe the state a significant amount in employee benefits contributions.

This sample has not been substantially edited by others. My supervisors at the Attorney General's Office reviewed it for redaction purposes and included some stylistic suggestions that I accepted.

To:	Shireen Farahani
From:	Stephen Mageras
Date:	August 3, 2022
Re:	XYZ Company v. New Jersey Department of Labor Preemption Claim

Memorandum

Question Presented

Does the Federal Aviation Administration Authorization Act of 1994 (the "FAAAA") preempt the enactment and enforcement of N.J. Stat. Ann. § 43:21-19(i)(6) (the "NJ ABC test")?

Short Answer

The FAAAA does not preempt the NJ ABC test. The Third Circuit held in Bedoya v. Am. Eagle Express Inc., 914 F.3d 812 (3d Cir. 2019) that the NJ ABC test does not have a sufficiently direct or significant impact on motor carrier prices, routes, or services to be preempted by the FAAAA.

Background

XYZ Company ("XYZ") is an auto parts distributor that provides delivery services using independent drivers. XYZ advertises its services to clients as an alternative to maintaining in-house delivery fleets. XYZ operates and employs drivers in the state of New Jersey.

In a series of audits, the New Jersey Department of Labor ("NJ DOL") found that XYZ had misclassified its employees as independent contractors. XYZ contested this finding and requested a declaration in the Office of Administrative Law ("OAL") that the NJ ABC test, which determines workers' employment classification, is preempted by the FAAAA. The NJ ABC test is a provision of the New Jersey Unemployment Compensation Law ("UCL"). An Administrative Law Judge ("ALJ") will hear XYZ's complaint ("XYZ Compl.").

Under the NJ ABC test, a worker performing services for a company in exchange for compensation is considered an employee unless the employer can show that:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> N.J. Stat. Ann. § 43:21-19(i)(6)(A)–(C) (West).

Analysis

The FAAAA does not preempt the NJ ABC test because the test does not have a sufficiently direct and significant impact on motor carrier prices, routes, or services to overcome the presumption against preemption. This precise question was answered in Bedoya, and the circumstances of the present case are not distinguishable from those in Bedoya.

I. Interpretations of Federal Statutes by Federal Circuit Courts Are Not Binding on New Jersey State Courts, but Are Typically Followed to Preserve Judicial Uniformity

No New Jersey state court has decided whether the FAAAA preempts the NJ ABC test, but the Third Circuit in Bedoya answered this question directly, holding that it does not. The District of New Jersey followed Bedoya in Eagle Sys., Inc. v. Asaro-Angelo, No. CV1811445MASDEA, 2019 WL 3459088 (D.N.J. July 31, 2019) (addressing, like the present case, arguments from a trucking service company that the NJ ABC test is preempted by the FAAAA). Although it is true that lower federal court decisions interpreting federal statutes do not bind state courts, they are entitled to due respect as a matter of comity and in the interest of uniformity. E.g., State v. Witczak, 23 A.3d 416, 424–25 (N.J. Super. Ct. App. Div. 2011). Given the lack of New Jersey state court precedent addressing this question, Bedoya is the most relevant and persuasive authority available and should be followed by a New Jersey state court to preserve judicial uniformity. Other federal circuits have ruled on whether the FAAAA preempts certain

states' employment classification tests (ABC tests), but these decisions concerned state tests that differ from the NJ ABC test to varying degrees. See Cal. Trucking Ass'n v. Bonta, 996 F.3d 644 (9th Cir. 2021) (holding FAAAA did not preempt the California ABC test); Costello v. BeavEx, Inc., 810 F.3d 1045 (7th Cir. 2016) (holding FAAAA did not preempt the Illinois ABC test); Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429 (1st Cir. 2016) (holding FAAAA preempted the Massachusetts ABC test).

Bedoya's strong precedential value is not altered if a putative employer brings a preemption challenge in the OAL. ALJs refer to the OAL as a lower state court and adopt the same stance as New Jersey state courts on the precedential weight of federal decisions. See, e.g., Our Lady of Lourdes Med. Ctr. v. Div. of Med. Assistance & Health Servs., OAL Docket No. HMA 09193-05 (Dec. 10, 2006), https://njlaw.rutgers.edu/collections/oal/html/initial/hma09193-05_1.html (explaining that the OAL is bound by state appellate opinions because the OAL is a lower state court); see also Cebula v. Catalina Mktg. Corp., OAL Docket No. CRT 05588-02, at 13 n.7 (Oct. 24, 2003), https://njlaw.rutgers.edu/collections/oal/final/crt05588-02.pdf (explaining that while New Jersey courts are not bound by federal precedent, they consistently look to federal decisions as a source of interpretive authority).

II. FAAAA Preemption Is Appropriate Where a State Law Has a Sufficiently Direct and Significant Impact on Carrier Prices, Routes, or Services

"[P]reemption doctrine stems from the Supremacy Clause, which provides that 'the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" Bedoya, 914 F.3d at 817 (quoting U.S. Const. art. VI, cl. 2). "There are three categories of preemption: field preemption, conflict preemption, and express preemption." Id. XYZ alleges that the NJ ABC test is expressly preempted by the FAAAA. (XYZ Compl.) Express preemption requires determining whether "[s]tate action may be

foreclosed by express language in a congressional enactment." Lupian v. Joseph Cory Holdings LLC, 905 F.3d 127, 131 (3d Cir. 2018) (alteration in original) (citation omitted).

"Preemption analysis begins with the presumption that Congress does not intend to supplant state law" in areas of traditional state police power (a "presumption against preemption"). Dilts v. Penske Logistics, LLC, 769 F.3d 637, 642–43 (9th Cir. 2014); see also Bedoya, 914 F.3d at 817; Lupian, 905 F.3d at 131–32. The employment regulations affected by the NJ ABC test seek to protect workers, so both the test and its dependent regulations fall in the category of traditional police power. See Bedoya, 914 F.3d at 818. The presumption against preemption is rebutted where Congress has a "clear and manifest purpose" to preempt state laws. E.g., id. To determine whether Congress had such a purpose, courts look to the plain language of the statute, the statutory framework as a whole, and any separate evidence of Congress' purpose in enacting the statute or similar statutes. Id.

Congress passed the FAAAA in 1994, seeking to deregulate both the air and motor carrier industries. See id. To this end, the FAAAA includes a preemption provision, which provides that: "a State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Given the breadth of the words "related to," the United States Supreme Court has provided additional guidance on when a state law can be considered related to carrier prices, routes, or services and thus preempted. See Nw., Inc. v. Ginsberg, 572 U.S. 273, 280–81 (2014) (addressing similar preemption language in the Airline Deregulation Act of 1978 ("the ADA")); Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 260–61 (2013); Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 370–71 (2008); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385–86, 390 (1992) (addressing the ADA).

Drawing on these cases, XYZ asserts that a state law is preempted if it "has a connection with, or reference to" a motor carrier's prices, routes, or services. XYZ Brief ("XYZ Br."). But, this argument ignores the bounds the Court has carefully set on the scope of preemption under this statutory language. The Court has observed that "the breadth of the words 'related to' does not mean the sky is the limit," Dan's City, 569 U.S. at 260, and to read the phrase "'related to' with 'uncritical literalism' would render preemption an endless exercise." Bedoya, 914 F.3d at 819 (citing Dan's City, 569 U.S. at 260–61). After all, "everything 'relates to' everything else in some manner." Schwann, 813 F.3d at 436 (citing N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)). As a result, the Court has cautioned that a law is not preempted if it affects carrier prices, routes, or services "in only a 'tenuous, remote, or peripheral . . . manner.'" Dan's City, 569 U.S. at 261 (quoting Rowe, 552 U.S. at 371). In addition, "preemption occurs where a state law has 'a significant impact on carrier rates, routes, or services.'" Bedoya, 914 F.3d at 819–20 (quoting Rowe, 552 U.S. at 375).

Federal circuit courts have built upon the principles articulated by the United States Supreme Court and further clarified the factors to be considered when assessing FAAAA preemption. Bedoya synthesizes this case law, explaining the considerations that have been found relevant to whether a state law has a sufficiently "direct" and "significant" effect to be preempted by the FAAAA. See id. at 820–23.

III. The NJ ABC Test Is Not Preempted by the FAAAA Under a Directness and Significance Analysis

A. Directness

To assess the directness of a law's effect on prices, routes, or services, courts should examine whether the law "(1) mentions a carrier's prices, routes, or services; (2) specifically

targets carriers as opposed to all businesses; and (3) addresses the carrier-customer relationship rather than non-customer-carrier relationships (e.g., carrier-employee)." Id. at 823.

The NJ ABC test does not have a sufficiently direct impact on motor carrier prices, routes, or services to be preempted by the FAAAA. If there is an effect, it is too "tenuous, remote, or peripheral" to warrant preemption. Dan's City, 569 U.S. at 261. First, the NJ ABC test makes no mention of motor carrier prices, routes, or services. Bedoya, 914 F.3d at 824. Nor does it specifically target carriers—the language of the statute addresses all businesses in the state of New Jersey. Id. Lastly, the NJ ABC test regulates at the level of the carrier-worker relationship, not the carrier-customer relationship. Id. State laws impacting the carrier-customer relationship are more likely to be preempted, see id. at 821–22, but laws that govern "how an employer pays its workers do not 'directly regulate[] how [a carrier's] service is performed[;]' they merely dictate how a carrier 'behaves as an employer[.]'" Id. at 824 (alterations in original) (quoting DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 88 (1st Cir. 2011)). As a result, the NJ ABC test is "'steps removed' from regulating customer-carrier interactions through prices, routes, or services." Id. (quoting Costello, 810 F.3d at 1054).

B. Significance

To assess whether a law has a significant effect on a carrier's prices, routes, or services, courts should consider whether:

> (1) the law binds a carrier to provide or not provide a particular price, route, or service; (2) the carrier has various avenues to comply with the law; (3) the law creates a patchwork of regulation that erects barriers to entry, imposes tariffs, or restricts the goods a carrier is permitted to transport; and (4) the law existed in one of the jurisdictions Congress determined lacked laws that regulate intrastate prices, routes, or services and thus, by implication, is a law Congress found not to interfere with the FAAAA's deregulatory goal. . . . [A] state law [may] ha[ve] a significant effect where the law undermines Congress' goal of having competitive market forces dictate prices, routes, or services of motor carriers.

Id. at 823.

The NJ ABC test also does not have a significant effect on motor carrier prices, routes, or services. The test "does not bind [carriers] to a particular method of providing services." Id.; see also Eagle Sys., 2019 WL 3459088, at *6–7. XYZ disputes this, arguing that the NJ ABC test requires them to use employees rather than independent contractors. (XYZ Compl.) XYZ seeks to draw parallels to Schwann, where the First Circuit ruled on anti-competition grounds that the Massachusetts ABC test was preempted by the FAAAA because it, in effect, "barr[ed] FedEx from using any individuals as full-fledged independent contractors." (XYZ Br.) (quoting Schwann, 813 F.3d at 437). The Third Circuit, however, explicitly distinguished the NJ ABC test from the Massachusetts ABC test. Bedoya, 914 F.3d at 824. While the two tests are largely the same, the NJ ABC test includes an alternative method for reaching independent contractor status if the putative employer can show that the worker provides services outside of the employer's places of business. N.J. Stat. Ann. § 43:21-19(i)(6)(B). In contrast with Schwann, "[n]o part of the New Jersey test categorically prevents carriers from using independent contractors. . . . [T]he state law . . . does not mandate a particular course of action." Bedoya, 914 F.3d at 824–25. This distinguishing feature of the NJ ABC test ensures that carriers have various avenues to comply with New Jersey employment laws. Id. at 825.

Even if a judge disagrees with Bedoya and Eagle Sys. and finds that the NJ ABC test does not give carriers a meaningful degree of increased flexibility compared to the Massachusetts ABC test considered in Schwann, it does not necessarily follow that Schwann is controlling and the NJ ABC test should be preempted. In Bonta, the Ninth Circuit reviewed a California ABC test that was effectively identical to the ABC test considered in Schwann and held that the connection between the California ABC test and carrier prices, routes, and services was too tenuous to warrant preemption under the FAAAA. See Bonta, 996 F.3d at 660. The Ninth Circuit emphasized that

even though the California ABC test "affects the way motor carriers must classify their workers, and therefore compels a particular result at the level of a motor carrier's relationship with its workforce[,]" id. at 659, this is permissible as long as it does not "effectively bind[] motor carriers to specific prices, routes, or services at the consumer level." Id. at 660–61. The differing opinions Schwann and Bonta express on this point constitute a circuit split, and XYZ has not justified why the First Circuit should be followed over the Ninth Circuit.

XYZ further alleges that being forced to establish and maintain an employee workforce will increase their costs (and in turn, their prices), and may require alteration of their driver's routes. See (XYZ Compl.) These alleged secondary effects are partially moot because, as discussed, the Bedoya court found that the NJ ABC test does not require that carriers use employees. However, it is possible that under the test, XYZ will be encouraged to "shift its model away from using independent contractors." Bedoya, 914 F.3d at 825. This type of impact is not significant enough to warrant FAAAA preemption because "[n]early every form of state regulation carries some cost." Dilts, 769 F.3d at 646. "Generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the[ir] [prices, routes, or services]." Id. In deregulating motor carriers, "Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability." Id. at 646–47 (citing 49 U.S.C. § 14501(c)).

Furthermore, XYZ has yet to present evidence demonstrating that the NJ ABC test will have the effects on their business that they allege. While XYZ does not need to produce "empirical evidence to support its assertions of significant impact at the pleading stage," Bedoya, 914 F.3d at 825 (citing Costello, 810 F.3d at 1055), there does need to be a "logical connection between the application of New Jersey's ABC classification test and the list of new costs [a company] would

purportedly incur." Id. Among XYZ's parade of horrors, it is particularly difficult to discern the logical connection between the NJ ABC test and XYZ being "driven out of business." (XYZ Compl.) Federal circuit courts have often rejected "lists of conclusory impacts" as sufficient evidence of significant impact on carrier prices, routes, or services for the purpose of preemption analysis. Bedoya, 914 F.3d at 825 (citing Lupian, 905 F.3d at 135–36 (finding that defendant's evidence of the negative financial impact they would incur if an Illinois wage law was not preempted did not equate to significant impact on Congress' deregulatory objectives); and Costello, 810 F.3d at 1056 (rejecting defendant's contention that increased labor costs as a result of the Illinois ABC test amounted to evidence of significant impact on the prices defendant offered to their customers)).

The NJ ABC test does not create a "'patchwork' of unique state legislation[,]" Bedoya, 914 F.3d at 826 (citation omitted), because New Jersey's test is "similar to that used in many other states." Bedoya, 914 F.3d at 826 (citing Chambers v. RDI Logistics, Inc., 65 N.E.3d 1, 11–12 (Mass. 2016)). Nor does the NJ ABC test significantly undermine Congress' goal of having "competitive market forces dictate prices, routes, or services of motor carriers." Id. at 823. XYZ alleges that the NJ ABC test "as applied to small motor carriers impermissibly interfere[s] with natural market forces and competition." (XYZ Compl.) However, the text of the NJ ABC test is indifferent to whether a motor carrier is "large" or "small." See N.J. Stat. Ann. § 43:21-19(i)(6). In isolation, it cannot have the effect of "encourag[ing] motor carriers to change business models" because of their relative size. (XYZ Compl.) Finally, the NJ ABC test is not "the kind of preexisting state regulation[] with which Congress was concerned when it passed the FAAAA." Bedoya, 914 F.3d at 826. The legislative history demonstrates this: "[E]ight of the ten jurisdictions that Congress identified as not regulating intrastate prices, routes, and services [when passing the

FAAAA] 'had laws for differentiating between an employee and an independent contractor,' . . . and at least three codified ABC tests similar to that of New Jersey." Id. (citations omitted).

C. This Case Is Not Distinguishable from Federal Circuit Decisions

XYZ may try to distinguish the facts here from those in federal circuit decisions that have found no FAAAA preemption. For instance, XYZ may argue that this case is distinguishable from Bedoya because Bedoya concerned private individuals alleging that their employer misclassified them as independent contractors, whereas this case involves the state enforcing its employment laws in a way that XYZ alleges prevents them from classifying any of their workers as independent contractors. The District Court of New Jersey found this argument unpersuasive in Eagle Sys., holding that the putative employer's "attempts to distinguish the instant matter from the facts and procedural posture of Bedoya are not supported by any authority suggesting that those differences require a different result . . . ." Eagle Sys., 2019 WL 3459088, at *6.

XYZ has previously argued that this case is distinguishable from Costello because unlike the Illinois wage law at issue in Costello, the New Jersey UCL contains no provision "allow[ing] motor carriers to 'contract around' the Statute's requirements." (XYZ Br.) (quoting Costello, 810 F.3d at 1057). However, the Bedoya court explicitly rejected the idea that a contractual workaround is necessary to avoid preemption. Bedoya, 914 F.3d at 824–25 n.8. "[W]hile a contractual circumvention option may provide another route for compliance, weighing against FAAAA preemption, it is not the only way a state statute can afford carriers some flexibility. Here, the New Jersey ABC classification test gives carriers options . . . ." Id.

Conclusion

For the reasons stated herein, the NJ ABC test is not preempted by the FAAAA.

STEPHEN MAGERAS
548 Driggs Avenue #4
Brooklyn, NY 11211
(203) 979-0982
stephen.mageras@gmail.com

Writing Sample #2

The sample below is a memorandum I drafted last summer as a research assistant for Professor Farhang Heydari, the Legal Director of the New York University Policing Project. I was asked to explain the origins of the First Amendment "right to gather information" and whether this right allows individuals to photograph others in public spaces. This question was triggered by conversations Professor Heydari had with private companies that are installing automatic license plate readers around the country and selling the data they collect to law enforcement. When asked whether their activities might infringe on privacy rights, the companies responded that they had a First Amendment right to gather this type of data in public spaces. Selling license plate data to law enforcement may also raise Fourth Amendment questions, but for this memorandum, Professor Heydari asked me to focus on the boundaries of a private right to gather information.

This sample is entirely my own work. It has not been edited by others.

Stephen Mageras

Professor Farhang Heydari

July 20, 2022

Memorandum

Question Presented

Where does the First Amendment right to gather information come from and how has this right been applied? Does a general right to photograph in public spaces flow from this right to gather information?

Analysis

I. Origins of the Right to Gather Information

The First Amendment states that Congress "shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. In the most literal sense, the First Amendment protects "the freedom to speak and the freedom to publish using a printing press." Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 Ohio St. L.J. 249, 250 (2004). However, the Supreme Court considers the purpose of the First Amendment, in particular the Speech Clause, to be much broader than this. *See id.* at 258. The Court has construed the Speech Clause to protect "most forms of human conduct engaged in for the purpose of expressing or communicating information or ideas." *Id.* Beyond speaking and other verbal forms, this includes representing things visually, acts that are necessarily or integrally tied to acts of expression, and acts that are engaged in with the intent to communicate a message. *Id.* at 258–59. Because information gathering can be integrally tied to expression, or engaged in with the intent to communicate a

message, it necessarily must be afforded some degree of First Amendment protection under Supreme Court precedents. *See id.* at 259–262.

The Court began to explicitly recognize that information gathering warrants First Amendment protection in the seminal cases *Zemel v. Rusk*, 381 U.S. 1 (1965), and *Branzburg v. Hayes*, 408 U.S. 665 (1972). The question in *Zemel* was whether it was constitutionally permissible for the Secretary of State to deny passport validation to a United States citizen who sought to travel to Cuba. 381 U.S. at 3. The appellant alleged that a ban on travel to Cuba was "direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies . . . and with conditions abroad which might affect such policies." *Id.* at 16. The Court acknowledged that the travel ban "renders less than wholly free the flow of information concerning that country[,]" but rejected the contention that a First Amendment right was involved. *Id.* The Court was wary of setting such a precedent given that nearly all government restrictions on action impede the wholly free flow of information in one way or another. *See id.* at 16–17. In their first mention of a "right to gather information," the Court asserted that "[t]he right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.* at 17 (emphasis added).

In *Branzburg*, a news reporter claimed a First Amendment privilege in refusing to testify before a grand jury about his confidential sources. 408 U.S. at 667–79. The reporter argued that without an implied testimonial privilege, the freedom of the press to collect and disseminate news would be undermined. *Id.* at 698. The Court ultimately rejected this claim, but in doing so made the following observation:

> The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information . . . . We do not question the significance of free speech, press, or assembly